ONTARIO
LABOUR RELATIONS BOARD
REPORTS

Annual
Consolidated Index 2012

Ontario

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ONTARIO
LABOUR RELATIONS BOARD
REPORTS

A Bimonthly Series of Decisions from the Ontario Labour Relations Board

Annual
Consolidated Index 2012

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

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ELLIS-DON LIMITED; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE .....(Jan/Feb) 131

Ambulance Services Collective Bargaining Act – Essential Services Agreement – The City of Toronto applied to the Board for a determination of the appropriate number of essential ambulance workers in the event of a lock-out – Local 416 was prepared to have 100% of the paramedics declared essential if the City would agree to interest arbitration – The City would not agree – The parties presented data to demonstrate there has been an increase in ambulance call volumes, changes in the mix of ambulance services provided over the past ten years (since the last ESA determination), a minimal increase in the paramedic complement, and a significant increase in service times per call – The Board noted that there had to be a difference between normal emergency cases ("business as usual") and essential ambulance services, otherwise there would be no need for the legislation – The legislation is intended to reconcile the competing policy interests of protecting free collective bargaining in an environment where essential ambulance services must be maintained during any labour disruption – Having considered the submissions of the parties, the relevant data, and the purposes of the ASCBA, the Board made determinations regarding the percentages of paramedic staff deemed essential – Order accordingly

THE CORPORATION OF THE CITY OF TORONTO; RE TORONTO CIVIC EMPLOYEES UNION, LOCAL 416 .....(Jan/Feb) 63

Bargaining Rights – Abandonment – Collective Agreement – Construction Industry Grievance – Evidence – The main issue was whether Ellis Don was bound to the Provincial Collective Agreement of each of the applicant trade unions based on the Sarnia Working Agreement (SWA) signed in 1958 – First, the Board found the SWA could be admitted into evidence as a business record or simply as an "ancient document" as it met the requirements of proof for such a document – Next, the Board found that although nothing happened for some 30 years, there was no evidence of bargaining from which the Board could infer a conscious decision to abandon bargaining rights or such neglect as to amount to such abandonment – The Board determined that there had been no abandonment of bargaining rights by the unions and that the SWA constituted a series of recognition agreements that bound Ellis Don to the Provincial Collective Agreements – The Board then addressed two arguments by Ellis Don seeking to limit the effect of two settlements (1987 and 1993) of grievances alleging that Ellis Don had subcontracted work contrary to the trade unions' Provincial Collective Agreements – The Board noted that it was statutory amendments that gave rise to the bargaining rights of the two applicant Unions (not a collective agreement), and that the bargaining rights were extended by statute in 1980 to every affiliated bargaining agent and their respective employee bargaining agency – Additionally, since the union parties to the Minutes were only the Sarnia local unions, any attack on the Minutes of Settlement would not affect the bargaining rights that were held by every affiliated bargaining agent – The Board found that a representation was made by the Building Trades Council, that it and its affiliates, would not seek to claim bargaining rights from the SWA beyond those set out in the 1987 and 1993 Minutes of Settlement and that Ellis Don was clearly prejudiced in relying upon that representation – A violation of the PCA was found, however the unions were estopped from claiming any damages and the Board declared that the estoppel was to last for two years – Application granted in part

ELLIS-DON LIMITED; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE.....(Jan/Feb) 131

Bargaining Unit – *Education Act* – Collective Agreement – Application for certification by ETFO for a bargaining unit of designated Early Childhood Educators ("DECE's") – CUPE intervened claiming ETFO's application was an abuse of process and untimely because the employees sought were already covered by the CUPE Local 4156 agreement with the School Board – The province recently amended the *Education Act* (the "Act") to provide for an Early Learning Program which required school boards to provide full day senior and junior kindergarten –The DECE position originated with the development of this program and the *Act* states that staffing for these classrooms must consist of one teacher covered by the relevant ETFO collective agreement and a DECE as defined in the *Act* – The CUPE collective agreement covers "all employees" of the School Board "regularly employed as office, clerical, technical and instructional support staff"– There was no dispute that the DECE's were not office, clerical or technical staff so the Board had to determine whether they were captured as "instructional support staff" – The Board's analysis focused on determining what instructional support staff under the collective agreement do and comparing that to what the DECE's do – The Board asked whether the duties, responsibilities and work of the DECE's was sufficiently similar to bring them within the instructional support group that are already represented by CUPE – The School Board and ETFO argued that DECE's were qualitatively different than instructional support staff and were a sort of "quasi-teacher" (or educator) thus making them separate and distinct from instructional support staff – CUPE argued there was no appreciable difference between DECE duties and responsibilities which may be legislatively prescribed and the duties and responsibilities assigned and performed by CUPE instructional support staff – The Board found that although there were some

differences between the duties of DECE's and instructional support staff the distinctions were not very great – The Board concluded that the DECE's are covered by the CUPE collective agreement – Accordingly, ETFO's application for certification was untimely – Application dismissed

DISTRICT SCHOOL BOARD OF NIAGARA; RE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; RE CUPE .....(Jan/Feb) 114

Bargaining unit – *Hospital Labour Disputes Arbitration Act* – Reference – Ministerial reference to the Board under *HLDAA* (the "*Act*") seeking advice on whether the relevant bargaining unit employees are covered by the *Act* – The employer is a residential provider and treatment facility for children and youth exhibiting extremely aggressive behaviour in other settings – It operates nine residential facilities providing care and treatment for boys experiencing difficulties such as conduct disorders, psychiatric disorders and attention deficit disorder – It is a privately held, for profit corporation that receives its revenue directly from agencies (primarily Children Aid Societies) who place individuals in their residence – It provides three major types of services; residential services, clinical services and its school – Residential services employ the largest group represented by the union: Child Care Therapists ("CCTs") – There are approximately 130 full time and part time CCTs who are responsible for daily care and supervision of the residents – CCTs will often get residents ready for school, transport them to school, accompany them while at school, and transport them back to residence where they will participate in recreational activities and then assist residents with various night time rituals before bed – The Board began its analysis by reiterating the statutory criteria that must be satisfied in order for an entity to be a hospital for the purpose of the *Act*: a) the entity must serve persons who suffer from a physical or mental illness, disease or injury or be convalescent or chronically ill; b) the entity must be operated for the observation, care or treatment of such persons and c) the entity must be a hospital or "other institution" – The Board found the evidence established that the children and youth display serious psychiatric and behavioural problems and therefore it was clear the employer served persons with a mental illness – Next, the Board found the evidence clearly established that the residents were regularly under observation, care and treatment of the staff because staff members provide residents with 24 hour a day, 7 days a week supervision – In regard to whether the employer is an "other institution" the Board stated it was required to carefully balance the norm of free collective bargaining against the need to ensure continued hospital services for persons who have physical or mental disabilities – The Board found that almost all of a resident's medical or physical care is provided by staff members of the employer or by Consulting Psychiatrists retained by the employer, on employer premises – The CCTs provide considerable care to residents in the form of 24 hours per day, seven day per week care while carrying out the prescribed plans of the Consulting Psychiatrists, Psychologists and other therapists – The Board considered the consequences a work stoppage may have on residents and noted the model upon which the employer is built has at its foundation the relationships that are established, maintained and nurtured amongst its residents and staff members – A work stoppage, which has no time frame, may cause residents to believe they have been abandoned by their caregivers which is a sentiment that would likely continue beyond the conclusion of any work stoppage – The Board concluded by stating that if the purpose of the Act is to ensure that persons who are affected by physical or mental disabilities are not left in a position where their health, safety or well being is undermined in the event of a strike or lockout then this purpose is best satisfied by concluding the employer is a hospital for the purposes of the *Act* – Accordingly, the Board advised the Minister that the relevant employees are covered by the *Act*

BAYFIELD HOMES LTD; RE CUPE AND ITS LOCAL 4895 .....(Jan/Feb) 10

Bargaining Unit – *Hospital Labour Disputes Arbitration Act* – Reference – The Minister asked whether the relevant bargaining unit employees working at Syl Apps Youth Centre (SAYC) were covered by *HLDAA* – SAYC has two residential programs: Youth Justice (providing placements in Secure Detention and Secure Custody under the *Youth Criminal Justice Act*) and Secure Treatment (which provides services for youth with mental disorders as defined in the *Child and Family Services Act* and the *Criminal Code*) – The Board accepted that many of the SAYC youths had mental health problems and that treatment was provided by SAYC staff and outside professionals – The Board also noted that the Dialectical Behavioural Treatment offered was relevant care that could be included in the definition of "hospital" even though it was not medical in nature – While these factors supported inclusion in the definition of hospital, the Board found that the relationship between the clients and SAYC was formed because the youth need custody and detention and typically not because of the mental health services provided by SAYC – Furthermore the Board found that the labour relations history of these parties (the negotiation of four collective agreements under the *LRA* and a seven and one half month strike with services maintained) was a significant factor – The Board found it could not conclude that the public interest in the continued provision of hospital services, broadly stated, required extension of that interest to the operations of SAYC – Reference answered in the negative

KINARK CHILD AND FAMILY SERVICES – SYL APPS YOUTH CENTRE; RE OPSEU AND ITS LOCAL 213 .....(Jan/Feb) 203

Certification – Construction Industry – Council of Trade Unions – Trade Union – The Ontario Council of Construction Unions (OCCU), composed of two entities (Local 1030 of the Carpenters and CCWU, both having been recognized as trade unions and construction trade unions), applied for certification – Locals 183 and 1081 of the Labourers intervened, and with Brookfield, argued that the OCCU could not be certified as a council of trade unions on procedural and substantive grounds – Procedurally, although the Board found that Local 1030 and the CCWU had not taken the necessary steps to adopt the OCCU constitution and vest it with appropriate authority prior to the date of application, it found that subsequent resolutions evinced a clear intent on both Local 1030 and the CCWU to adopt and be bound by the OCCU constitution and to vest the OCCU with the authority to acquire bargaining rights and enter into collective agreements – The Board found the procedural requirements of s. 12 to have been met – Among other substantive matters it was submitted that OCCU was subject to a fundamental constitutional flaw in that it was formed for the illegal object of enabling the Carpenters to represent construction labourers in the ICI sector contrary to s. 162(2) of the Act – The Board found that one of its obligations on a certification application was to determine an appropriate bargaining unit, and that it would not permit Brookfield and the Labourers to conflate an argument about the appropriateness of an ICI bargaining unit for the OCCU into a finding of overall illegality of the OCCU – The issue of the appropriateness of a bargaining unit will be decided when it has to be – The other substantive objections relating to specific articles of OCCU's constitution were dismissed by the Board – Matter continues

BROOKFIELD HOMES (ONTARIO) LIMITED; RE ONTARIO COUNCIL OF CONSTRUCTION UNIONS; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; RE LIUNA, LOCAL 1081 .....(Jan/Feb) 54

Certification – Construction Industry – Employee – Practice and Procedure – Status – The Board examined the status of two individuals engaged to do drywall taping work – Although the union could not find the individuals in question to testify about their work relationship, and the employer alleged consequent prejudice, the Board ruled that there was no right to cross-examine a person whose status is in dispute if the person need not be called as a witness because the relevant facts are either agreed to or not in dispute – The principal individual was hired at an hourly rate to perform taping work; he (and a helper) supplied only their labour and personal protective equipment – Gold Star argued the individual was an entrepreneur – The Board disagreed, finding that the individuals were dependent contractors – Matter continues

GOLD STAR DEVELOPMENT INC. O/A GOLD STAR DRYWALL SERVICES; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1891.....(Jan/Feb) 164

Certification – Employee – CUPE sought to organize the post-doctoral fellows (PDFs) at the University of Toronto – The employer asserted that the relationship of the PDFs to their faculty member (as principal investigator) and to the University was predominantly educational and not as employees – The Board examined the funding of the PDF positions, the nature of their collaborative research, including time commitment, and the requirement that PDFs adhere to university guidelines (e.g. Code of Behaviour) – The Board distinguished past decisions relating to the employment status of graduate students and equally found that rulings of the Tax Court of Canada were of no assistance – The Board found the PDFs perform work in the university's labs, using the university's equipment and materials, produce something of value (research) and receive compensation for the work performed – These are all hallmarks of an employment relationship – Matter remitted to parties to resolve outstanding issues

GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO; RE CUPE.(Jan/Feb) 175

Collective Agreement – Abandonment – Bargaining Rights – Construction Industry Grievance – Evidence – The main issue was whether Ellis Don was bound to the Provincial Collective Agreement of each of the applicant trade unions based on the Sarnia Working Agreement (SWA) signed in 1958 – First, the Board found the SWA could be admitted into evidence as a business record or simply as an "ancient document" as it met the requirements of proof for such a document – Next, the Board found that although nothing happened for some 30 years, there was no evidence of bargaining from which the Board could infer a conscious decision to abandon bargaining rights or such neglect as to amount to such abandonment – The Board determined that there had been no abandonment of bargaining rights by the unions and that the SWA constituted a series of recognition agreements that bound Ellis Don to the Provincial Collective Agreements – The Board then addressed two arguments by Ellis Don seeking to limit the effect of two settlements (1987 and 1993) of grievances alleging that Ellis Don had subcontracted work contrary to the trade unions' Provincial Collective Agreements – The Board noted that it was statutory amendments that gave rise to the bargaining rights of the two applicant Unions (not a collective agreement), and that the bargaining rights were extended by statute in 1980 to every affiliated bargaining agent and their respective employee bargaining agency – Additionally, since the union parties to the Minutes were only the Sarnia local unions, any attack on the Minutes of Settlement would not affect the bargaining rights that were held by every affiliated bargaining agent – The Board found that a representation was made by the Building Trades Council, that it and its affiliates, would not seek to claim bargaining rights from the SWA beyond those set out in the 1987 and 1993 Minutes of Settlement and that Ellis Don was clearly prejudiced in relying upon that representation –

A violation of the PCA was found, however the unions were estopped from claiming any damages and the Board declared that the estoppel was to last for two years – Application granted in part

ELLIS-DON LIMITED; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE.....(Jan/Feb) 131

Collective Agreement – Bargaining Unit – *Education Act* – Application for certification by ETFO for a bargaining unit of designated Early Childhood Educators ("DECE's") – CUPE intervened claiming ETFO's application was an abuse of process and untimely because the employees sought were already covered by the CUPE Local 4156 agreement with the School Board – The province recently amended the *Education Act* (the "Act") to provide for an Early Learning Program which required school boards to provide full day senior and junior kindergarten –The DECE position originated with the development of this program and the *Act* states that staffing for these classrooms must consist of one teacher covered by the relevant ETFO collective agreement and a DECE as defined in the *Act* – The CUPE collective agreement covers "all employees" of the School Board "regularly employed as office, clerical, technical and instructional support staff"– There was no dispute that the DECE's were not office, clerical or technical staff so the Board had to determine whether they were captured as "instructional support staff" – The Board's analysis focused on determining what instructional support staff under the collective agreement do and comparing that to what the DECE's do – The Board asked whether the duties, responsibilities and work of the DECE's was sufficiently similar to bring them within the instructional support group that are already represented by CUPE – The School Board and ETFO argued that DECE's were qualitatively different than instructional support staff and were a sort of "quasi-teacher" (or educator) thus making them separate and distinct from instructional support staff – CUPE argued there was no appreciable difference between DECE duties and responsibilities which may be legislatively prescribed and the duties and responsibilities assigned and performed by CUPE instructional support staff – The Board found that although there were some differences between the duties of DECE's and instructional support staff the distinctions were not very great – The Board concluded that the DECE's are covered by the CUPE collective agreement – Accordingly, ETFO's application for certification was untimely – Application dismissed

DISTRICT SCHOOL BOARD OF NIAGARA; RE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; RE CUPE.....(Jan/Feb) 114

Construction Industry – Certification – Council of Trade Unions – Trade Union – The Ontario Council of Construction Unions (OCCU), composed of two entities (Local 1030 of the Carpenters and CCWU, both having been recognized as trade unions and construction trade unions), applied for certification – Locals 183 and 1081 of the Labourers intervened, and with Brookfield, argued that the OCCU could not be certified as a council of trade unions on procedural and substantive grounds – Procedurally, although the Board found that Local 1030 and the CCWU had not taken the necessary steps to adopt the OCCU constitution and vest it with appropriate authority prior to the date of application, it found that subsequent resolutions evinced a clear intent on both Local 1030 and the CCWU to adopt and be bound by the OCCU constitution and to vest the OCCU with the authority to acquire bargaining rights and enter into collective agreements – The Board found the procedural requirements of s. 12 to have been met – Among other substantive matters it was submitted that OCCU was subject to a fundamental constitutional flaw in that it was formed for the illegal object of enabling the Carpenters to represent construction labourers in the ICI sector contrary to s. 162(2) of the Act – The Board

found that one of its obligations on a certification application was to determine an appropriate bargaining unit, and that it would not permit Brookfield and the Labourers to conflate an argument about the appropriateness of an ICI bargaining unit for the OCCU into a finding of overall illegality of the OCCU – The issue of the appropriateness of a bargaining unit will be decided when it has to be – The other substantive objections relating to specific articles of OCCU's constitution were dismissed by the Board – Matter continues

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Construction Industry – Certification – Employee – Practice and Procedure – Status – The Board examined the status of two individuals engaged to do drywall taping work – Although the union could not find the individuals in question to testify about their work relationship, and the employer alleged consequent prejudice, the Board ruled that there was no right to cross-examine a person whose status is in dispute if the person need not be called as a witness because the relevant facts are either agreed to or not in dispute – The principal individual was hired at an hourly rate to perform taping work; he (and a helper) supplied only their labour and personal protective equipment – Gold Star argued the individual was an entrepreneur – The Board disagreed, finding that the individuals were dependent contractors – Matter continues

GOLD STAR DEVELOPMENT INC. O/A GOLD STAR DRYWALL SERVICES; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1891 ..... (Jan/Feb) 164

Construction Industry Grievance – Abandonment – Bargaining Rights – Collective Agreement – Evidence – The main issue was whether Ellis Don was bound to the Provincial Collective Agreement of each of the applicant trade unions based on the Sarnia Working Agreement (SWA) signed in 1958 – First, the Board found the SWA could be admitted into evidence as a business record or simply as an "ancient document" as it met the requirements of proof for such a document – Next, the Board found that although nothing happened for some 30 years, there was no evidence of bargaining from which the Board could infer a conscious decision to abandon bargaining rights or such neglect as to amount to such abandonment – The Board determined that there had been no abandonment of bargaining rights by the unions and that the SWA constituted a series of recognition agreements that bound Ellis Don to the Provincial Collective Agreements – The Board then addressed two arguments by Ellis Don seeking to limit the effect of two settlements (1987 and 1993) of grievances alleging that Ellis Don had subcontracted work contrary to the trade unions' Provincial Collective Agreements – The Board noted that it was statutory amendments that gave rise to the bargaining rights of the two applicant Unions (not a collective agreement), and that the bargaining rights were extended by statute in 1980 to every affiliated bargaining agent and their respective employee bargaining agency – Additionally, since the union parties to the Minutes were only the Sarnia local unions, any attack on the Minutes of Settlement would not affect the bargaining rights that were held by every affiliated bargaining agent – The Board found that a representation was made by the Building Trades Council, that it and its affiliates, would not seek to claim bargaining rights from the SWA beyond those set out in the 1987 and 1993 Minutes of Settlement and that Ellis Don was clearly prejudiced in relying upon that representation – A violation of the PCA was found, however the unions were estopped from claiming any damages and the Board declared that the estoppel was to last for two years – Application granted in part

ELLIS-DON LIMITED; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE.....(Jan/Feb) 131

Council of Trade Unions – Certification – Construction Industry – Trade Union – The Ontario Council of Construction Unions (OCCU), composed of two entities (Local 1030 of the Carpenters and CCWU, both having been recognized as trade unions and construction trade unions), applied for certification Locals 183 and 1081 of the Labourers intervened, and with Brookfield, argued that the OCCU could not be certified as a council of trade unions on procedural and substantive grounds – Procedurally, although the Board found that Local 1030 and the CCWU had not taken the necessary steps to adopt the OCCU constitution and vest it with appropriate authority prior to the date of application, it found that subsequent resolutions evinced a clear intent on both Local 1030 and the CCWU to adopt and be bound by the OCCU constitution and to vest the OCCU with the authority to acquire bargaining rights and enter into collective agreements – The Board found the procedural requirements of s. 12 to have been met – Among other substantive matters it was submitted that OCCU was subject to a fundamental constitutional flaw in that it was formed for the illegal object of enabling the Carpenters to represent construction labourers in the ICI sector contrary to s. 162(2) of the Act – The Board found that one of its obligations on a certification application was to determine an appropriate bargaining unit, and that it would not permit Brookfield and the Labourers to conflate an argument about the appropriateness of an ICI bargaining unit for the OCCU into a finding of overall illegality of the OCCU – The issue of the appropriateness of a bargaining unit will be decided when it has to be – The other substantive objections relating to specific articles of OCCU's constitution were dismissed by the Board – Matter continues

BROOKFIELD HOMES (ONTARIO) LIMITED; RE ONTARIO COUNCIL OF CONSTRUCTION UNIONS; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; RE LIUNA, LOCAL 1081.....(Jan/Feb) 54

Crown Employees Collective Bargaining Act – Duty to Bargain in Good Faith – Unfair Labour Practice – AMAPCEO filed an unfair labour practice complaint alleging a breach of s. 17 by the Crown – Prior to AMAPCEO and the Crown entering into collective bargaining, the Crown and OPSEU ratified a renewal of their collective agreement publicly announcing increases of 1.75, 2, 2, and 2% per year – However, not reflected in the memorandum of settlement and not announced publicly was a confidential agreement entered into between the Crown and OPSEU which stated that the bargaining unit members would receive an extra 1% on the final year of the deal effectively making the increase 3% and not 2% – The Crown and AMAPCEO agreed on the renewal of a collective agreement and subsequently AMAPCEO found out about the confidential agreement – AMAPCEO alleged that the Crown's conduct in deliberately keeping this from them constituted bargaining in bad faith – The Crown argued that AMAPCEO failed to establish that it made a misrepresentation to AMAPCEO during collective bargaining – Alternatively, it argued that the Board requires there be more than a mere misrepresentation before it will find a violation of s. 17 of the Act – The Board stated that the duty to bargain in good faith requires parties to engage in full and honest discussion and censures parties for withholding information that the party opposite requires in order to intelligently appraise a proposal – The Board found that the terms agreed to between OPSEU and the Crown (including the confidential additional 1%) were relevant to AMAPCEO in the course of collective bargaining with the Crown – The Board found that the Crown entered into the confidential agreement with OPSEU in order to create a construct whereby AMAPCEO would believe that the public announcement reflected the actual OPSEU increases – The Board held that this was a deliberate misrepresentation

made in bad faith – The intent was to cause AMAPCEO to perceive the OPSEU settlement to be less costly and in turn cause AMAPCEO to lower its own expectations at the bargaining table – The Crown violated s. 17 of the Act and future hearing dates were scheduled to determine the matter of damages

CROWN IN RIGHT OF ONTARIO (AS REPRESENTED BY THE MINISTRY OF GOVERNMENT SERVICES); RE ASSOCIATION OF MANAGEMENT, ADMINSTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO .....(Jan/Feb) 90

Discharge – Duty to Bargain in Good Faith – Strike – Unfair Labour Practice – The employer discharged nine employees for alleged misconduct during the course of a long strike – The union alleged that the employer's failure to agree to any procedure which may give rise to reinstatement of the nine employees meant the employer did not make every reasonable effort to make a collective agreement and therefore has breached s. 17 of the Act – During the strike which began on July 13, 2009 the employer continued operations hiring replacement workers with some bargaining unit members who crossed the picket line and resumed work – The employer's security staff compiled reports relating to incidents on the picket line and these reports were forwarded to the manager of Human Resources for review – If based on her review the manager of human resources thought discipline was warranted, she would make a recommendation to a committee of senior managers for review and a decision as to discipline – As a result of this process nine striking employees were terminated – Meanwhile, negotiations continued between the parties – In February 2010 the parties resumed collective bargaining with the assistance of a mediator – The employer's position from the beginning was that if someone was fired during the strike they were not coming back to work – Negotiations were on and off until a final push took place in June 2010 – An agreement was reached on all issues except with respect to the nine discharged employees – The union offered that the issue of the discharged employees be sent to arbitration; the employer refused to move from its position – The sole issue which prevented the parties from concluding a collective agreement was their dispute about whether the discharges of the nine disputed employees should go to arbitration – The Board found that the obligation to make every reasonable effort to make a collective agreement means that a party's position on a fundamentally significant issue must be capable of rational discussion, must be based on an honest assessment of the negotiations and on what would be reasonably required to make a collective agreement having regard to the significance of the issue – The Board concluded that the employer adopted an intransigent position on an issue of fundamental significance to the union – The employer's position was patently unreasonable and in maintaining that position the employer was not making every reasonable effort to make a collective agreement and therefore breached s. 17 of the Act – The matter was directed to arbitration on the just cause standard but no extraordinary orders were made in respect to the conduct of the arbitrations – Application granted

VALE INCO LIMITED; RE UNITED STEELWORKERS ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCALS 6500 AND 6200..... 251

Discharge – Employment Standards – In this employer application for review of an Employment Standards Officer's determination awarding the employee four weeks' termination pay, the employer argued that it was not liable to pay termination pay as the employee had quit her employment – After a heated discussion between the employee and one of the directors of the applicant corporation, the employee punched out on the employee time clock and left the office – Approximately ten minutes later, after calling her husband to relay what had happened, the employee went back to the office to talk the

situation over with the employer – She resumed her duties despite being told by the employer that she had already quit and had to leave – The employer called police and had the employee escorted off the premises – The Board found it unnecessary to determine exactly whether the employee said the words "I quit" – The Board stated that even if she initially gave the impression that she was quitting in a fit of anger, within ten minutes she was back, calm and prepared to resume her work – Thus, the employee clearly did not wish to sever her employment relationship – The Board distinguished the case at hand from *Creative Hair Design* [2000] OLRB Rep. January/February 35, where it had found the actions of the employee constituted a true resignation as the employee formed the subjective intention to quit, and objectively conveyed her intention to the employer – In that case, the Board stated, it was the employee's calm and cool communication of her intent to quit once she had gotten over her fit of pique that gave the employer the right to presume she had resigned – Application dismissed

DELUXE TAXI (BARRIE) LTD.; RE LILIANA LUPO AND DIRECTOR OF EMPLOYMENT STANDARDS 110

Discharge – Employment Standards – Reprisal – The employer applied for review of an Employment Standard Officer's finding that it failed to reinstate an employee into the position she held prior to her pregnancy leave and that the employer engaged in a reprisal contrary to s. 74 – The employer argued that the employee's job did not exist upon her return from her leave and that she was placed in a comparable job – Further, it argued that her termination was for legitimate business reasons and had nothing to do with her pregnancy leave – While she was on the leave the employer underwent organizational restructuring which resulted in the elimination of her prior position – She was given a new position upon her return – The Board found that the organizational decision made by the employer and the elimination of the employee's position were done in good faith – Accordingly, the Board held that the end of her employment in her previous position had nothing to do with her pregnancy leave – Similarly, the Board held that there was nothing unlawful about the employer's decision to offer the employee a new position without any loss of compensation or change in the terms and conditions of her work environment – However, the Board took issue with the timing of her termination – She was terminated before the end of the employer's busy summer season – The employer did not adequately explain the timing of her termination to the Board – The Board was left to conclude that one reason the employee was terminated was because she purported to assert her rights under the Act – The Board stated that inquiries by an employee of his or her rights, even an *attempt* to exercise a statutory right, are protected under s. 74 – Application granted, in part

MARINELAND OF CANADA INC.; RE JACQUELINE EMBLETON AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Jan/Feb) 214

Duty of Fair Representation – Judicial Review – Applicant sought judicial review of a Board decision dismissing an application for failing to make a *prima facie* case – The applicant alleged that the union violated s. 74 by its response to his complaint regarding the School Board's failure to credit him with 'related experience' prior to becoming a teacher – The applicant's reconsideration application was also dismissed – Finding that the Board possessed 'unique expertise', the Court held that both decisions must be given deference – It was apparent to the Board that the union had carried out its duties under s. 74 of the Act, and had done what it considered to be in the best interest of the applicant – Application dismissed

JOHN MCKENNEY; RE UPPER CANADA DISTRICT SCHOOL BOARD; RE ONTARIO SECONDARY SCHOOL TEACHERS FEDERATION; RE ONTARIO SECONDARY SCHOOL TEACHERS FEDERATION DISTRICT 26 AND OLRB..(Jan/Feb) 289

Duty to Bargain in Good Faith – *Crown Employees Collective Bargaining Act* – Unfair Labour Practice – AMAPCEO filed an unfair labour practice complaint alleging a breach of s. 17 by the Crown – Prior to AMAPCEO and the Crown entering into collective bargaining, the Crown and OPSEU ratified a renewal of their collective agreement publicly announcing increases of 1.75, 2, 2, and 2% per year – However, not reflected in the memorandum of settlement and not announced publicly was a confidential agreement entered into between the Crown and OPSEU which stated that the bargaining unit members would receive an extra 1% on the final year of the deal effectively making the increase 3% and not 2% – The Crown and AMAPCEO agreed on the renewal of a collective agreement and subsequently AMAPCEO found out about the confidential agreement – AMAPCEO alleged that the Crown's conduct in deliberately keeping this from them constituted bargaining in bad faith – The Crown argued that AMAPCEO failed to establish that it made a misrepresentation to AMAPCEO during collective bargaining – Alternatively, it argued that the Board requires there be more than a mere misrepresentation before it will find a violation of s. 17 of the Act – The Board stated that the duty to bargain in good faith requires parties to engage in full and honest discussion and censures parties for withholding information that the party opposite requires in order to intelligently appraise a proposal – The Board found that the terms agreed to between OPSEU and the Crown (including the confidential additional 1%) were relevant to AMAPCEO in the course of collective bargaining with the Crown – The Board found that the Crown entered into the confidential agreement with OPSEU in order to create a construct whereby AMAPCEO would believe that the public announcement reflected the actual OPSEU increases – The Board held that this was a deliberate misrepresentation made in bad faith – The intent was to cause AMAPCEO to perceive the OPSEU settlement to be less costly and in turn cause AMAPCEO to lower its own expectations at the bargaining table – The Crown violated s. 17 of the Act and future hearing dates were scheduled to determine the matter of damages

CROWN IN RIGHT OF ONTARIO (AS REPRESENTED BY THE MINISTRY OF GOVERNMENT SERVICES); RE ASSOCIATION OF MANAGEMENT, ADMINSTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO(Jan/Feb) 90

Duty to Bargain in Good Faith – Discharge – Strike – Unfair Labour Practice – The employer discharged nine employees for alleged misconduct during the course of a long strike – The union alleged that the employer's failure to agree to any procedure which may give rise to reinstatement of the nine employees meant the employer did not make every reasonable effort to make a collective agreement and therefore has breached s. 17 of the Act – During the strike which began on July 13, 2009 the employer continued operations hiring replacement workers with some bargaining unit members who crossed the picket line and resumed work – The employer's security staff compiled reports relating to incidents on the picket line and these reports were forwarded to the manager of Human Resources for review – If based on her review the manager of human resources thought discipline was warranted, she would make a recommendation to a committee of senior managers for review and a decision as to discipline – As a result of this process nine striking employees were terminated – Meanwhile, negotiations continued between the parties – In February 2010 the parties resumed collective bargaining with the assistance of a mediator – The employer's position from the beginning was that if someone was fired during the strike they were not coming back to work – Negotiations were on and off until a final push took place in June 2010 – An agreement was reached on all issues

except with respect to the nine discharged employees – The union offered that the issue of the discharged employees be sent to arbitration; the employer refused to move from its position – The sole issue which prevented the parties from concluding a collective agreement was their dispute about whether the discharges of the nine disputed employees should go to arbitration – The Board found that the obligation to make every reasonable effort to make a collective agreement means that a party's position on a fundamentally significant issue must be capable of rational discussion, must be based on an honest assessment of the negotiations and on what would be reasonably required to make a collective agreement having regard to the significance of the issue – The Board concluded that the employer adopted an intransigent position on an issue of fundamental significance to the union – The employer's position was patently unreasonable and in maintaining that position the employer was not making every reasonable effort to make a collective agreement and therefore breached s. 17 of the Act – The matter was directed to arbitration on the just cause standard but no extraordinary orders were made in respect to the conduct of the arbitrations – Application granted

VALE INCO LIMITED; RE UNITED STEELWORKERS ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCALS 6500 AND 6200.....(Jan/Feb) 251

Education Act – Bargaining Unit – Collective Agreement – Application for certification by ETFO for a bargaining unit of designated Early Childhood Educators ("DECE's") – CUPE intervened claiming ETFO's application was an abuse of process and untimely because the employees sought were already covered by the CUPE Local 4156 agreement with the School Board – The province recently amended the *Education Act* (the "Act") to provide for an Early Learning Program which required school boards to provide full day senior and junior kindergarten –The DECE position originated with the development of this program and the *Act* states that staffing for these classrooms must consist of one teacher covered by the relevant ETFO collective agreement and a DECE as defined in the *Act* – The CUPE collective agreement covers "all employees" of the School Board "regularly employed as office, clerical, technical and instructional support staff"– There was no dispute that the DECE's were not office, clerical or technical staff so the Board had to determine whether they were captured as "instructional support staff" – The Board's analysis focused on determining what instructional support staff under the collective agreement do and comparing that to what the DECE's do – The Board asked whether the duties, responsibilities and work of the DECE's was sufficiently similar to bring them within the instructional support group that are already represented by CUPE – The School Board and ETFO argued that DECE's were qualitatively different than instructional support staff and were a sort of "quasi-teacher" (or educator) thus making them separate and distinct from instructional support staff – CUPE argued there was no appreciable difference between DECE duties and responsibilities which may be legislatively prescribed and the duties and responsibilities assigned and performed by CUPE instructional support staff – The Board found that although there were some differences between the duties of DECE's and instructional support staff the distinctions were not very great – The Board concluded that the DECE's are covered by the CUPE collective agreement – Accordingly, ETFO's application for certification was untimely – Application dismissed

DISTRICT SCHOOL BOARD OF NIAGARA; RE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; RE CUPE.....(Jan/Feb) 114

Employee – Certification – Construction Industry – Practice and Procedure – Status – The Board examined the status of two individuals engaged to do drywall taping work – Although the union could not find the individuals in question to testify about their work

relationship, and the employer alleged consequent prejudice, the Board ruled that there was no right to cross-examine a person whose status is in dispute if the person need not be called as a witness because the relevant facts are either agreed to or not in dispute – The principal individual was hired at an hourly rate to perform taping work; he (and a helper) supplied only their labour and personal protective equipment – Gold Star argued the individual was an entrepreneur – The Board disagreed, finding that the individuals were dependent contractors – Matter continues

GOLD STAR DEVELOPMENT INC. O/A GOLD STAR DRYWALL SERVICES; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1891.....(Jan/Feb) 164

Employee – Certification – CUPE sought to organize the post-doctoral fellows (PDFs) at the University of Toronto – The employer asserted that the relationship of the PDFs to their faculty member (as principal investigator) and to the University was predominantly educational and not as employees – The Board examined the funding of the PDF positions, the nature of their collaborative research, including time commitment, and the requirement that PDFs adhere to university guidelines (e.g. Code of Behaviour) – The Board distinguished past decisions relating to the employment status of graduate students and equally found that rulings of the Tax Court of Canada were of no assistance – The Board found the PDFs perform work in the university's labs, using the university's equipment and materials, produce something of value (research) and receive compensation for the work performed – These are all hallmarks of an employment relationship – Matter remitted to parties to resolve outstanding issues

GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO; RE CUPE.(Jan/Feb) 175

Employment Standards Discharge In this employer application for review of an Employment Standards Officer's determination awarding the employee four weeks' termination pay, the employer argued that it was not liable to pay termination pay as the employee had quit her employment – After a heated discussion between the employee and one of the directors of the applicant corporation, the employee punched out on the employee time clock and left the office – Approximately ten minutes later, after calling her husband to relay what had happened, the employee went back to the office to talk the situation over with the employer – She resumed her duties despite being told by the employer that she had already quit and had to leave – The employer called police and had the employee escorted off the premises – The Board found it unnecessary to determine exactly whether the employee said the words "I quit" – The Board stated that even if she initially gave the impression that she was quitting in a fit of anger, within ten minutes she was back, calm and prepared to resume her work – Thus, the employee clearly did not wish to sever her employment relationship – The Board distinguished the case at hand from *Creative Hair Design* [2000] OLRB Rep. January/February 35, where it had found the actions of the employee constituted a true resignation as the employee formed the subjective intention to quit, and objectively conveyed her intention to the employer – In that case, the Board stated, it was the employee's calm and cool communication of her intent to quit once she had gotten over her fit of pique that gave the employer the right to presume she had resigned – Application dismissed

DELUXE TAXI (BARRIE) LTD.; RE LILIANA LUPO AND DIRECTOR OF EMPLOYMENT STANDARDS.....(Jan/Feb) 110

Employment Standards – Discharge – Reprisal – The employer applied for review of an Employment Standard Officer's finding that it failed to reinstate an employee into the

position she held prior to her pregnancy leave and that the employer engaged in a reprisal contrary to s. 74 – The employer argued that the employee's job did not exist upon her return from her leave and that she was placed in a comparable job – Further, it argued that her termination was for legitimate business reasons and had nothing to do with her pregnancy leave While she was on the leave the employer underwent organizational restructuring which resulted in the elimination of her prior position – She was given a new position upon her return – The Board found that the organizational decision made by the employer and the elimination of the employee's position were done in good faith – Accordingly, the Board held that the end of her employment in her previous position had nothing to do with her pregnancy leave – Similarly, the Board held that there was nothing unlawful about the employer's decision to offer the employee a new position without any loss of compensation or change in the terms and conditions of her work environment – However, the Board took issue with the timing of her termination – She was terminated before the end of the employer's busy summer season – The employer did not adequately explain the timing of her termination to the Board – The Board was left to conclude that one reason the employee was terminated was because she purported to assert her rights under the Act – The Board stated that inquiries by an employee of his or her rights, even an *attempt* to exercise a statutory right, are protected under s. 74 – Application granted, in part

MARINELAND OF CANADA INC.; RE JACQUELINE EMBLETON AND DIRECTOR OF EMPLOYMENT STANDARDS.....(Jan/Feb) 214

Essential Services Agreement – *Ambulance Services Collective Bargaining Act* – The City of Toronto applied to the Board for a determination of the appropriate number of essential ambulance workers in the event of a lock-out – Local 416 was prepared to have 100% of the paramedics declared essential if the City would agree to interest arbitration – The City would not agree – The parties presented data to demonstrate there has been an increase in ambulance call volumes, changes in the mix of ambulance services provided over the past ten years (since the last ESA determination), a minimal increase in the paramedic complement, and a significant increase in service times per call – The Board noted that there had to be a difference between normal emergency cases ("business as usual") and essential ambulance services, otherwise there would be no need for the legislation – The legislation is intended to reconcile the competing policy interests of protecting free collective bargaining in an environment where essential ambulance services must be maintained during any labour disruption – Having considered the submissions of the parties, the relevant data, and the purposes of the ASCBA, the Board made determinations regarding the percentages of paramedic staff deemed essential – Order accordingly

THE CORPORATION OF THE CITY OF TORONTO; RE TORONTO CIVIC EMPLOYEES UNION, LOCAL 416.....(Jan/Feb) 63

Evidence – Abandonment – Bargaining Rights – Collective Agreement – Construction Industry Grievance – The main issue was whether Ellis Don was bound to the Provincial Collective Agreement of each of the applicant trade unions based on the Sarnia Working Agreement (SWA) signed in 1958 – First, the Board found the SWA could be admitted into evidence as a business record or simply as an "ancient document" as it met the requirements of proof for such a document – Next, the Board found that although nothing happened for some 30 years, there was no evidence of bargaining from which the Board could infer a conscious decision to abandon bargaining rights or such neglect as to amount to such abandonment – The Board determined that there had been no abandonment of bargaining rights by the unions and that the SWA constituted a series of

recognition agreements that bound Ellis Don to the Provincial Collective Agreements – The Board then addressed two arguments by Ellis Don seeking to limit the effect of two settlements (1987 and 1993) of grievances alleging that Ellis Don had subcontracted work contrary to the trade unions' Provincial Collective Agreements – The Board noted that it was statutory amendments that gave rise to the bargaining rights of the two applicant Unions (not a collective agreement), and that the bargaining rights were extended by statute in 1980 to every affiliated bargaining agent and their respective employee bargaining agency – Additionally, since the union parties to the Minutes were only the Sarnia local unions, any attack on the Minutes of Settlement would not affect the bargaining rights that were held by every affiliated bargaining agent – The Board found that a representation was made by the Building Trades Council, that it and its affiliates, would not seek to claim bargaining rights from the SWA beyond those set out in the 1987 and 1993 Minutes of Settlement and that Ellis Don was clearly prejudiced in relying upon that representation – A violation of the PCA was found, however the unions were estopped from claiming any damages and the Board declared that the estoppel was to last for two years – Application granted in part

ELLIS-DON LIMITED; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE .....(Jan/Feb) 131

Evidence – Practice and Procedure – Witness – Following the resignation of a Vice-Chair who had heard days of evidence in a case where credibility was a significant issue, the Board was conducting a hearing *de novo* when union counsel put a prior inconsistent statement to the witness which he asserted was made in the previous hearing – The employer brought a motion submitting that the Board lacked the jurisdiction to hear evidence where no independent record of the prior hearing existed for the purposes of assessing credibility of witnesses – The Board noted that prior inconsistent statements may be made orally or in writing, may be sworn or unsworn, may occur in a variety of places and that there was nothing in the SPPA that would carve out a special exception to preclude exploration of an alleged prior inconsistent statement made under oath in a prior aborted proceeding before the same tribunal – The Board found that reasonable cross-examination concerning issues of significance are not the type of evidence which the Board should decline to hear from a witness, and that a refusal to hear such evidence may well constitute a breach of natural justice – The Board concluded that the specific question put by the union to the witness was a proper question which was not precluded by the SPPA – The Board found it was not appropriate to issue a pre-emptive exclusion order, of the reach sought, at the outset of the hearing – Motion dismissed – Matter continues

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 .....(Jan/Feb) 197

Hospital Labour Disputes Arbitration Act – Bargaining unit – Reference – Ministerial reference to the Board under *HLDAA* (the "*Act*") seeking advice on whether the relevant bargaining unit employees are covered by the *Act* – The employer is a residential provider and treatment facility for children and youth exhibiting extremely aggressive behaviour in other settings – It operates nine residential facilities providing care and treatment for boys experiencing difficulties such as conduct disorders, psychiatric disorders and attention deficit disorder – It is a privately held, for profit corporation that receives its revenue directly from agencies (primarily Children Aid Societies) who place individuals in their residence – It provides three major types of services; residential services, clinical services and its school – Residential services employ the largest group represented by the union: Child Care Therapists ("CCTs") – There are approximately 130 full time and part time

CCTs who are responsible for daily care and supervision of the residents – CCTs will often get residents ready for school, transport them to school, accompany them while at school, and transport them back to residence where they will participate in recreational activities and then assist residents with various night time rituals before bed – The Board began its analysis by reiterating the statutory criteria that must be satisfied in order for an entity to be a hospital for the purpose of the *Act*: a) the entity must serve persons who suffer from a physical or mental illness, disease or injury or be convalescent or chronically ill; b) the entity must be operated for the observation, care or treatment of such persons and c) the entity must be a hospital or "other institution" – The Board found the evidence established that the children and youth display serious psychiatric and behavioural problems and therefore it was clear the employer served persons with a mental illness – Next, the Board found the evidence clearly established that the residents were regularly under observation, care and treatment of the staff because staff members provide residents with 24 hour a day, 7 days a week supervision – In regard to whether the employer is an "other institution" the Board stated it was required to carefully balance the norm of free collective bargaining against the need to ensure continued hospital services for persons who have physical or mental disabilities – The Board found that almost all of a resident's medical or physical care is provided by staff members of the employer or by Consulting Psychiatrists retained by the employer, on employer premises – The CCTs provide considerable care to residents in the form of 24 hours per day, seven day per week care while carrying out the prescribed plans of the Consulting Psychiatrists, Psychologists and other therapists – The Board considered the consequences a work stoppage may have on residents and noted the model upon which the employer is built has at its foundation the relationships that are established, maintained and nurtured amongst its residents and staff members – A work stoppage, which has no time frame, may cause residents to believe they have been abandoned by their caregivers which is a sentiment that would likely continue beyond the conclusion of any work stoppage – The Board concluded by stating that if the purpose of the Act is to ensure that persons who are affected by physical or mental disabilities are not left in a position where their health, safety or well being is undermined in the event of a strike or lockout then this purpose is best satisfied by concluding the employer is a hospital for the purposes of the *Act* – Accordingly, the Board advised the Minister that the relevant employees are covered by the *Act*

BAYFIELD HOMES LTD; RE CUPE AND ITS LOCAL 4895 .....(Jan/Feb) 10

Hospital Labour Disputes Arbitration Act – Bargaining Unit – Reference – The Minister asked whether the relevant bargaining unit employees working at Syl Apps Youth Centre (SAYC) were covered by *HLDAA* – SAYC has two residential programs: Youth Justice (providing placements in Secure Detention and Secure Custody under the *Youth Criminal Justice Act*) and Secure Treatment (which provides services for youth with mental disorders as defined in the *Child and Family Services Act* and the *Criminal Code*) – The Board accepted that many of the SAYC youths had mental health problems and that treatment was provided by SAYC staff and outside professionals – The Board also noted that the Dialectical Behavioural Treatment offered was relevant care that could be included in the definition of "hospital" even though it was not medical in nature – While these factors supported inclusion in the definition of hospital, the Board found that the relationship between the clients and SAYC was formed because the youth need custody and detention and typically not because of the mental health services provided by SAYC – Furthermore the Board found that the labour relations history of these parties (the negotiation of four collective agreements under the *LRA* and a seven and one half month strike with services maintained) was a significant factor – The Board found it could not conclude that the public interest in the continued provision of hospital services, broadly

stated, required extension of that interest to the operations of SAYC Reference answered in the negative

KINARK CHILD AND FAMILY SERVICES – SYL APPS YOUTH CENTRE; RE OPSEU AND ITS LOCAL 213 .....(Jan/Feb) 203

Intimidation and Coercion Unfair Labour Practice – The union alleged that during its organizing drive the employer threatened the job security of its employees in letters addressed to them from the CEO, in newspaper articles directed at the employees, and in staff meetings – The Board found that the CEO's attendance at and conduct of a sales department meeting was intended to intimidate the employees in response to their union activity – Furthermore, sudden, unannounced and stunningly high wage increases were implemented just days after the application for certification was filed – The Board found the raises were completed hastily, inconsistent with instructions from just two months earlier, and out of line with the economic climate – In addition, lay-offs following certification were clearly tied to the union's successful campaign, both in terms of motivation and the identity of individuals let go – Application allowed; declarations made, including reinstatement, damages and posted Notice to Employees

MING PAO NEWSPAPERS (CANADA) LTD.; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 87-M SOUTHERN ONTARIO NEWSMEDIA GUILD .....(Jan/Feb) 226

Judicial Review – Duty of Fair Representation – Applicant sought judicial review of a Board decision dismissing an application for failing to make a *prima facie* case – The applicant alleged that the union violated s. 74 by its response to his complaint regarding the School Board's failure to credit him with 'related experience' prior to becoming a teacher – The applicant's reconsideration application was also dismissed – Finding that the Board possessed 'unique expertise', the Court held that both decisions must be given deference – It was apparent to the Board that the union had carried out its duties under s. 74 of the Act, and had done what it considered to be in the best interest of the applicant – Application dismissed

JOHN MCKENNEY; RE UPPER CANADA DISTRICT SCHOOL BOARD; RE ONTARIO SECONDARY SCHOOL TEACHERS FEDERATION; RE ONTARIO SECONDARY SCHOOL TEACHERS FEDERATION DISTRICT 26 AND OLRB .....(Jan/Feb) 289

Judicial Review – Non-Construction Employer – The employer sought judicial review of two Board decisions: the '2005 decision' relating to an application under s. 127.2 of the LRA to terminate the bargaining rights of the respondent unions; and the '2009 decision' in which the application was dismissed as the applicant did not satisfy the definition of "non-construction employer" under s. 126(1) of the Act – The applicant raised two issues before the Court: (1) whether the Board erred in the 2005 decision in holding that it was not bound by a previous determination that the applicant was a "non-construction employer" under s. 126(1) of the Act; and (2) whether the Board erred in the 2009 decision in determining that the applicant was not a "non-construction employer" under s. 127.2 – The Court held that in interpreting its home statute, the Board is not engaged in statutory interpretation in a broad sense, and that interpretation of the impugned sections fell within the expertise of the Board – The standard of review is reasonableness – With respect to the 2005 decision, the Court held that the Board was reasonable in finding that it was not bound by earlier decisions which held that the applicant was a "non-construction employer" – With respect to the 2009 decision, the applicant argued that as a

'school board', it cannot be engaged in the construction industry as the definition of the term under the Act references 'businesses' – The Court held that the Board was alive to the applicant's position in relation to its status, and the Board was reasonable in concluding, consistent with its jurisprudence, that an "employer" continues to be governed by the construction industry provisions of the Act as long as the employer is doing any construction work for an unrelated person from whom it expects compensation – The Court further rejected the applicant's submission that the work of "construction management" is not "work in the construction industry" within the meaning of s. 126(1) of the Act – Finally, the Court rejected the applicant's argument that the compensation paid to the applicant was not from unrelated persons – Application dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773; THE INTERNATIONAL UNIONS OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 6; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; THE INTERNATIONAL UNIONS OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND OLRB.....(Jan/Feb) 280

Judicial Review – Status – Trade Union – SEIU sought review of a Board decision finding that OWU was a trade union within the meaning of the Act – The Court held the Board was reasonable in concluding first that a trade union did not have to be an organization of employees *only*; and second, that the founding members of the OWU could unanimously agree to waive, suspend or vary the provisions of their contract (constitution) – The OWU was clearly viable for collective bargaining in the relevant sense – Application for judicial review dismissed

HUMBER RIVER REGIONAL HOSPITAL; ONTARIO WORKERS' UNION AND OLRB; RE SEIU, LOCAL 1 CANADA.....(Jan/Feb) 287

Non-Construction Employer – Judicial Review – The employer sought judicial review of two Board decisions: the '2005 decision' relating to an application under s. 127.2 of the LRA to terminate the bargaining rights of the respondent unions; and the '2009 decision' in which the application was dismissed as the applicant did not satisfy the definition of "non-construction employer" under s. 126(1) of the Act – The applicant raised two issues before the Court: (1) whether the Board erred in the 2005 decision in holding that it was not bound by a previous determination that the applicant was a "non-construction employer" under s. 126(1) of the Act; and (2) whether the Board erred in the 2009 decision in determining that the applicant was not a "non-construction employer" under s. 127.2 – The Court held that in interpreting its home statute, the Board is not engaged in statutory interpretation in a broad sense, and that interpretation of the impugned sections fell within the expertise of the Board – The standard of review is reasonableness – With respect to the 2005 decision, the Court held that the Board was reasonable in finding that it was not bound by earlier decisions which held that the applicant was a "non-construction employer" – With respect to the 2009 decision, the applicant argued that as a 'school board', it cannot be engaged in the construction industry as the definition of the term under the Act references 'businesses' – The Court held that the Board was alive to the applicant's position in relation to its status, and the Board was reasonable in concluding, consistent with its jurisprudence, that an "employer" continues to be governed by the construction industry provisions of the Act as long as the employer is doing any construction work for an unrelated person from whom it expects compensation – The Court further rejected the applicant's submission that the work of "construction management" is not "work in the construction industry" within the meaning of s. 126(1)

of the Act – Finally, the Court rejected the applicant's argument that the compensation paid to the applicant was not from unrelated persons – Application dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773; THE INTERNATIONAL UNIONS OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 6; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; THE INTERNATIONAL UNIONS OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND OLRB.....(Jan/Feb) 280

Practice and Procedure – Certification – Construction Industry – Employee – Status – The Board examined the status of two individuals engaged to do drywall taping work – Although the union could not find the individuals in question to testify about their work relationship, and the employer alleged consequent prejudice, the Board ruled that there was no right to cross-examine a person whose status is in dispute if the person need not be called as a witness because the relevant facts are either agreed to or not in dispute – The principal individual was hired at an hourly rate to perform taping work; he (and a helper) supplied only their labour and personal protective equipment – Gold Star argued the individual was an entrepreneur – The Board disagreed, finding that the individuals were dependent contractors – Matter continues

GOLD STAR DEVELOPMENT INC. O/A GOLD STAR DRYWALL SERVICES; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1891.....(Jan/Feb) 164

Practice and Procedure – Evidence – Witness – Following the resignation of a Vice-Chair who had heard days of evidence in a case where credibility was a significant issue, the Board was conducting a hearing *de novo* when union counsel put a prior inconsistent statement to the witness which he asserted was made in the previous hearing – The employer brought a motion submitting that the Board lacked the jurisdiction to hear evidence where no independent record of the prior hearing existed for the purposes of assessing credibility of witnesses – The Board noted that prior inconsistent statements may be made orally or in writing, may be sworn or unsworn, may occur in a variety of places and that there was nothing in the SPPA that would carve out a special exception to preclude exploration of an alleged prior inconsistent statement made under oath in a prior aborted proceeding before the same tribunal – The Board found that reasonable cross-examination concerning issues of significance are not the type of evidence which the Board should decline to hear from a witness, and that a refusal to hear such evidence may well constitute a breach of natural justice – The Board concluded that the specific question put by the union to the witness was a proper question which was not precluded by the SPPA – The Board found it was not appropriate to issue a pre-emptive exclusion order, of the reach sought, at the outset of the hearing – Motion dismissed – Matter continues

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183.....(Jan/Feb) 197

Reference – Bargaining unit – *Hospital Labour Disputes Arbitration Act* – Ministerial reference to the Board under *HLDAA* (the "*Act*") seeking advice on whether the relevant bargaining unit employees are covered by the *Act* – The employer is a residential provider and treatment facility for children and youth exhibiting extremely aggressive behaviour in other settings – It operates nine residential facilities providing care and treatment for boys

experiencing difficulties such as conduct disorders, psychiatric disorders and attention deficit disorder – It is a privately held, for profit corporation that receives its revenue directly from agencies (primarily Children Aid Societies) who place individuals in their residence – It provides three major types of services; residential services, clinical services and its school – Residential services employ the largest group represented by the union: Child Care Therapists ("CCTs") – There are approximately 130 full time and part time CCTs who are responsible for daily care and supervision of the residents – CCTs will often get residents ready for school, transport them to school, accompany them while at school, and transport them back to residence where they will participate in recreational activities and then assist residents with various night time rituals before bed – The Board began its analysis by reiterating the statutory criteria that must be satisfied in order for an entity to be a hospital for the purpose of the *Act*: a) the entity must serve persons who suffer from a physical or mental illness, disease or injury or be convalescent or chronically ill; b) the entity must be operated for the observation, care or treatment of such persons and c) the entity must be a hospital or "other institution" – The Board found the evidence established that the children and youth display serious psychiatric and behavioural problems and therefore it was clear the employer served persons with a mental illness – Next, the Board found the evidence clearly established that the residents were regularly under observation, care and treatment of the staff because staff members provide residents with 24 hour a day, 7 days a week supervision – In regard to whether the employer is an "other institution" the Board stated it was required to carefully balance the norm of free collective bargaining against the need to ensure continued hospital services for persons who have physical or mental disabilities – The Board found that almost all of a resident's medical or physical care is provided by staff members of the employer or by Consulting Psychiatrists retained by the employer, on employer premises – The CCTs provide considerable care to residents in the form of 24 hours per day, seven day per week care while carrying out the prescribed plans of the Consulting Psychiatrists, Psychologists and other therapists – The Board considered the consequences a work stoppage may have on residents and noted the model upon which the employer is built has at its foundation the relationships that are established, maintained and nurtured amongst its residents and staff members – A work stoppage, which has no time frame, may cause residents to believe they have been abandoned by their caregivers which is a sentiment that would likely continue beyond the conclusion of any work stoppage – The Board concluded by stating that if the purpose of the Act is to ensure that persons who are affected by physical or mental disabilities are not left in a position where their health, safety or well being is undermined in the event of a strike or lockout then this purpose is best satisfied by concluding the employer is a hospital for the purposes of the *Act* – Accordingly, the Board advised the Minister that the relevant employees are covered by the *Act*

BAYFIELD HOMES LTD; RE CUPE AND ITS LOCAL 4895 .....(Jan/Feb) 10

Reference – Bargaining Unit – *Hospital Labour Disputes Arbitration Act* – The Minister asked whether the relevant bargaining unit employees working at Syl Apps Youth Centre (SAYC) were covered by *HLDAA* – SAYC has two residential programs: Youth Justice (providing placements in Secure Detention and Secure Custody under the *Youth Criminal Justice Act*) and Secure Treatment (which provides services for youth with mental disorders as defined in the *Child and Family Services Act* and the *Criminal Code*) – The Board accepted that many of the SAYC youths had mental health problems and that treatment was provided by SAYC staff and outside professionals – The Board also noted that the Dialectical Behavioural Treatment offered was relevant care that could be included in the definition of "hospital" even though it was not medical in nature – While these factors supported inclusion in the definition of hospital, the Board found that the

relationship between the clients and SAYC was formed because the youth need custody and detention and typically not because of the mental health services provided by SAYC – Furthermore the Board found that the labour relations history of these parties (the negotiation of four collective agreements under the *LRA* and a seven and one half month strike with services maintained) was a significant factor – The Board found it could not conclude that the public interest in the continued provision of hospital services, broadly stated, required extension of that interest to the operations of SAYC – Reference answered in the negative

KINARK CHILD AND FAMILY SERVICES – SYL APPS YOUTH CENTRE; RE OPSEU AND ITS LOCAL 213 ..... (Jan/Feb) 203

Reprisal – Discharge – Employment Standards – The employer applied for review of an Employment Standard Officer's finding that it failed to reinstate an employee into the position she held prior to her pregnancy leave and that the employer engaged in a reprisal contrary to s. 74 – The employer argued that the employee's job did not exist upon her return from her leave and that she was placed in a comparable job – Further, it argued that her termination was for legitimate business reasons and had nothing to do with her pregnancy leave – While she was on the leave the employer underwent organizational restructuring which resulted in the elimination of her prior position – She was given a new position upon her return – The Board found that the organizational decision made by the employer and the elimination of the employee's position were done in good faith – Accordingly, the Board held that the end of her employment in her previous position had nothing to do with her pregnancy leave – Similarly, the Board held that there was nothing unlawful about the employer's decision to offer the employee a new position without any loss of compensation or change in the terms and conditions of her work environment However, the Board took issue with the timing of her termination – She was terminated before the end of the employer's busy summer season – The employer did not adequately explain the timing of her termination to the Board – The Board was left to conclude that one reason the employee was terminated was because she purported to assert her rights under the Act – The Board stated that inquiries by an employee of his or her rights, even an *attempt* to exercise a statutory right, are protected under s. 74 – Application granted, in part

MARINELAND OF CANADA INC.; RE JACQUELINE EMBLETON AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Jan/Feb) 214

Sector Determination – The Board was asked to ascertain the appropriate sector for the construction of a landfill gas management system – The Board determined it would not subdivide the work in dispute but would assess it as a package of work since it was a unique project and bid as such – The employer argued that the work fell into the sewer and watermain sector; the OE and the Labourers suggested it was ICI work or, alternatively, in the pipeline sector – Applying the criteria identified in *Sault Ste. Marie* [2002] OLRB Rep. September/October 870, the Board examined: (1) bargaining patterns (neutral); (2) an overall assessment of factors relevant to work characteristics, which led to the conclusion that problems and solutions, skills, trade and employee relations favour the ICI sector; materials and specifications are neutral; (3) end use is industrial, thus favouring the ICI sector – The Board concluded that the landfill gas management system falls within the ICI sector

AVERY CONSTRUCTION LIMITED TRANSPORTATION SERVICES; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, LIUNA,

LOCAL 1036, LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; IBEW CONSTRUCTION COUNCIL OF ONTARIO ..... (Jan/Feb) 1

Status – Certification – Construction Industry – Employee – Practice and Procedure – The Board examined the status of two individuals engaged to do drywall taping work – Although the union could not find the individuals in question to testify about their work relationship, and the employer alleged consequent prejudice, the Board ruled that there was no right to cross-examine a person whose status is in dispute if the person need not be called as a witness because the relevant facts are either agreed to or not in dispute – The principal individual was hired at an hourly rate to perform taping work; he (and a helper) supplied only their labour and personal protective equipment – Gold Star argued the individual was an entrepreneur – The Board disagreed, finding that the individuals were dependent contractors – Matter continues

GOLD STAR DEVELOPMENT INC. O/A GOLD STAR DRYWALL SERVICES; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1891 ..... (Jan/Feb) 164

Status – Judicial Review – Trade Union – SEIU sought review of a Board decision finding that OWU was a trade union within the meaning of the Act – The Court held the Board was reasonable in concluding first that a trade union did not have to be an organization of employees *only*; and second, that the founding members of the OWU could unanimously agree to waive, suspend or vary the provisions of their contract (constitution) – The OWU was clearly viable for collective bargaining in the relevant sense – Application for judicial review dismissed

HUMBER RIVER REGIONAL HOSPITAL; ONTARIO WORKERS' UNION AND OLRB; RE SEIU, LOCAL 1 CANADA ..... (Jan/Feb) 287

Strike – Discharge – Duty to Bargain in Good Faith – Unfair Labour Practice – The employer discharged nine employees for alleged misconduct during the course of a long strike – The union alleged that the employer's failure to agree to any procedure which may give rise to reinstatement of the nine employees meant the employer did not make every reasonable effort to make a collective agreement and therefore has breached s. 17 of the Act – During the strike which began on July 13, 2009 the employer continued operations hiring replacement workers with some bargaining unit members who crossed the picket line and resumed work – The employer's security staff compiled reports relating to incidents on the picket line and these reports were forwarded to the manager of Human Resources for review – If based on her review the manager of human resources thought discipline was warranted, she would make a recommendation to a committee of senior managers for review and a decision as to discipline – As a result of this process nine striking employees were terminated – Meanwhile, negotiations continued between the parties – In February 2010 the parties resumed collective bargaining with the assistance of a mediator – The employer's position from the beginning was that if someone was fired during the strike they were not coming back to work – Negotiations were on and off until a final push took place in June 2010 – An agreement was reached on all issues except with respect to the nine discharged employees – The union offered that the issue of the discharged employees be sent to arbitration; the employer refused to move from its position – The sole issue which prevented the parties from concluding a collective agreement was their dispute about whether the discharges of the nine disputed employees should go to arbitration – The Board found that the obligation to make every reasonable effort to make a collective agreement means that a party's position on a fundamentally significant issue must be capable of rational discussion, must be based on an honest

assessment of the negotiations and on what would be reasonably required to make a collective agreement having regard to the significance of the issue – The Board concluded that the employer adopted an intransigent position on an issue of fundamental significance to the union – The employer's position was patently unreasonable and in maintaining that position the employer was not making every reasonable effort to make a collective agreement and therefore breached s. 17 of the Act – The matter was directed to arbitration on the just cause standard but no extraordinary orders were made in respect to the conduct of the arbitrations – Application granted

VALE INCO LIMITED; RE UNITED STEELWORKERS ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCALS 6500 AND 6200.....(Jan/Feb) 251

Trade Union – Certification – Construction Industry – Council of Trade Unions – The Ontario Council of Construction Unions (OCCU), composed of two entities (Local 1030 of the Carpenters and CCWU, both having been recognized as trade unions and construction trade unions), applied for certification Locals 183 and 1081 of the Labourers intervened, and with Brookfield, argued that the OCCU could not be certified as a council of trade unions on procedural and substantive grounds – Procedurally, although the Board found that Local 1030 and the CCWU had not taken the necessary steps to adopt the OCCU constitution and vest it with appropriate authority prior to the date of application, it found that subsequent resolutions evinced a clear intent on both Local 1030 and the CCWU to adopt and be bound by the OCCU constitution and to vest the OCCU with the authority to acquire bargaining rights and enter into collective agreements – The Board found the procedural requirements of s. 12 to have been met – Among other substantive matters it was submitted that OCCU was subject to a fundamental constitutional flaw in that it was formed for the illegal object of enabling the Carpenters to represent construction labourers in the ICI sector contrary to s. 162(2) of the Act – The Board found that one of its obligations on a certification application was to determine an appropriate bargaining unit, and that it would not permit Brookfield and the Labourers to conflate an argument about the appropriateness of an ICI bargaining unit for the OCCU into a finding of overall illegality of the OCCU – The issue of the appropriateness of a bargaining unit will be decided when it has to be – The other substantive objections relating to specific articles of OCCU's constitution were dismissed by the Board – Matter continues

BROOKFIELD HOMES (ONTARIO) LIMITED; RE ONTARIO COUNCIL OF CONSTRUCTION UNIONS; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; RE LIUNA, LOCAL 1081.....(Jan/Feb) 54

Trade Union – Judicial Review – Status – SEIU sought review of a Board decision finding that OWU was a trade union within the meaning of the Act – The Court held the Board was reasonable in concluding first that a trade union did not have to be an organization of employees *only*; and second, that the founding members of the OWU could unanimously agree to waive, suspend or vary the provisions of their contract (constitution) – The OWU was clearly viable for collective bargaining in the relevant sense – Application for judicial review dismissed

HUMBER RIVER REGIONAL HOSPITAL; ONTARIO WORKERS' UNION AND OLRB; RE SEIU, LOCAL 1 CANADA.....(Jan/Feb) 287

Unfair Labour Practice – *Crown Employees Collective Bargaining Act* – Duty to Bargain in Good Faith – AMAPCEO filed an unfair labour practice complaint alleging a breach of s. 17 by the Crown – Prior to AMAPCEO and the Crown entering into collective

bargaining, the Crown and OPSEU ratified a renewal of their collective agreement publicly announcing increases of 1.75, 2, 2, and 2% per year – However, not reflected in the memorandum of settlement and not announced publicly was a confidential agreement entered into between the Crown and OPSEU which stated that the bargaining unit members would receive an extra 1% on the final year of the deal effectively making the increase 3% and not 2% – The Crown and AMAPCEO agreed on the renewal of a collective agreement and subsequently AMAPCEO found out about the confidential agreement – AMAPCEO alleged that the Crown's conduct in deliberately keeping this from them constituted bargaining in bad faith – The Crown argued that AMAPCEO failed to establish that it made a misrepresentation to AMAPCEO during collective bargaining – Alternatively, it argued that the Board requires there be more than a mere misrepresentation before it will find a violation of s. 17 of the Act – The Board stated that the duty to bargain in good faith requires parties to engage in full and honest discussion and censures parties for withholding information that the party opposite requires in order to intelligently appraise a proposal – The Board found that the terms agreed to between OPSEU and the Crown (including the confidential additional 1%) were relevant to AMAPCEO in the course of collective bargaining with the Crown – The Board found that the Crown entered into the confidential agreement with OPSEU in order to create a construct whereby AMAPCEO would believe that the public announcement reflected the actual OPSEU increases – The Board held that this was a deliberate misrepresentation made in bad faith – The intent was to cause AMAPCEO to perceive the OPSEU settlement to be less costly and in turn cause AMAPCEO to lower its own expectations at the bargaining table – The Crown violated s. 17 of the Act and future hearing dates were scheduled to determine the matter of damages

CROWN IN RIGHT OF ONTARIO (AS REPRESENTED BY THE MINISTRY OF GOVERNMENT SERVICES); RE ASSOCIATION OF MANAGEMENT, ADMINSTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO
.....(Jan/Feb) 90

Unfair Labour Practice – Discharge – Duty to Bargain in Good Faith – Strike – The employer discharged nine employees for alleged misconduct during the course of a long strike – The union alleged that the employer's failure to agree to any procedure which may give rise to reinstatement of the nine employees meant the employer did not make every reasonable effort to make a collective agreement and therefore has breached s. 17 of the Act – During the strike which began on July 13, 2009 the employer continued operations hiring replacement workers with some bargaining unit members who crossed the picket line and resumed work – The employer's security staff compiled reports relating to incidents on the picket line and these reports were forwarded to the manager of Human Resources for review – If based on her review the manager of human resources thought discipline was warranted, she would make a recommendation to a committee of senior managers for review and a decision as to discipline – As a result of this process nine striking employees were terminated – Meanwhile, negotiations continued between the parties – In February 2010 the parties resumed collective bargaining with the assistance of a mediator – The employer's position from the beginning was that if someone was fired during the strike they were not coming back to work – Negotiations were on and off until a final push took place in June 2010 – An agreement was reached on all issues except with respect to the nine discharged employees – The union offered that the issue of the discharged employees be sent to arbitration; the employer refused to move from its position – The sole issue which prevented the parties from concluding a collective agreement was their dispute about whether the discharges of the nine disputed employees should go to arbitration – The Board found that the obligation to make every reasonable effort to make a collective agreement means that a party's position on a fundamentally

significant issue must be capable of rational discussion, must be based on an honest assessment of the negotiations and on what would be reasonably required to make a collective agreement having regard to the significance of the issue – The Board concluded that the employer adopted an intransigent position on an issue of fundamental significance to the union – The employer's position was patently unreasonable and in maintaining that position the employer was not making every reasonable effort to make a collective agreement and therefore breached s. 17 of the Act – The matter was directed to arbitration on the just cause standard but no extraordinary orders were made in respect to the conduct of the arbitrations – Application granted

VALE INCO LIMITED; RE UNITED STEELWORKERS ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCALS 6500 AND 6200.....(Jan/Feb) 251

Unfair Labour Practice – Intimidation and Coercion – The union alleged that during its organizing drive the employer threatened the job security of its employees in letters addressed to them from the CEO, in newspaper articles directed at the employees, and in staff meetings – The Board found that the CEO's attendance at and conduct of a sales department meeting was intended to intimidate the employees in response to their union activity – Furthermore, sudden, unannounced and stunningly high wage increases were implemented just days after the application for certification was filed – The Board found the raises were completed hastily, inconsistent with instructions from just two months earlier, and out of line with the economic climate – In addition, lay-offs following certification were clearly tied to the union's successful campaign, both in terms of motivation and the identity of individuals let go – Application allowed; declarations made, including reinstatement, damages and posted Notice to Employees

MING PAO NEWSPAPERS (CANADA) LTD.; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 87-M SOUTHERN ONTARIO NEWSMEDIA GUILD.....(Jan/Feb) 226

Witness – Evidence – Practice and Procedure – Following the resignation of a Vice-Chair who had heard days of evidence in a case where credibility was a significant issue, the Board was conducting a hearing *de novo* when union counsel put a prior inconsistent statement to the witness which he asserted was made in the previous hearing – The employer brought a motion submitting that the Board lacked the jurisdiction to hear evidence where no independent record of the prior hearing existed for the purposes of assessing credibility of witnesses – The Board noted that prior inconsistent statements may be made orally or in writing, may be sworn or unsworn, may occur in a variety of places and that there was nothing in the SPPA that would carve out a special exception to preclude exploration of an alleged prior inconsistent statement made under oath in a prior aborted proceeding before the same tribunal – The Board found that reasonable cross-examination concerning issues of significance are not the type of evidence which the Board should decline to hear from a witness, and that a refusal to hear such evidence may well constitute a breach of natural justice – The Board concluded that the specific question put by the union to the witness was a proper question which was not precluded by the SPPA – The Board found it was not appropriate to issue a pre-emptive exclusion order, of the reach sought, at the outset of the hearing – Motion dismissed – Matter continues

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183.....(Jan/Feb) 197

Adjournment – First Contract Arbitration – Practice and Procedure – Termination – Unfair Labour Practice Subsequent to the PRCO filing an application under s 43 a decertification application was filed – The Board found that while s. 43(2) clearly establishes that it is the Legislature's intention that applications for first contract arbitration be determined expeditiously, the language was directory not mandatory – Furthermore, although nothing in the statute clearly states that subsection 43(2) is subject to subsection 43(23.1), it is the only reasonable interpretation that the language of that subsection can be given without reading it entirely out of the Act – Finally, the Board considered the words "dealing with or continuing to deal with" in s. 43(23.2) and found that ss 43(23.3) and 43(23.4), at the very least, establish that the Board cannot determine the outcome of an application for first contract arbitration until such time as the decertification application has been determined – Finally, the Board rejected PRCO's alternative request that the decertification and first contract arbitration applications be heard together – In the Board's view the section restricts the Board from proceeding with or dealing with the first contract arbitration which must mean that the Board is not to take any steps towards determining the outcome of the application for first contract arbitration until the decertification application has been dealt with – Matters continue

ALAMO PLUMBING & DRAIN SPECIALISTS INC.; RE PLUMBERS RESIDENTIAL COUNCIL, ONTARIO ..... (Mar/Apr) 291

Constitutional Law – Construction Industry Grievance – The IBEW referred three grievances to the Board and at the same time challenged the validity of earlier legislation that effectively wiped out longstanding bargaining rights by legislative fiat – The Attorney General of Ontario brought a preliminary motion to have the grievances dismissed because the constitutional challenges were predicated on the impermissible retroactive application of a Supreme Court of Canada decision in 2007 (*Health Sciences*) to legislation that had been spent or repealed long before (in 2001) – The issue concerned the legislation creating province-wide bargaining (1978) and its subsequent "deemed abandonment" (2001) and whether the Board could ascribe the Charter right to collective bargaining to a time *before* the SCC had found such a right to exist – The union sought to argue that the legal fictions created by the legislation (or removed by it) necessarily made court-made changes to the law (i.e., the recognition of the right to collective bargaining) applicable to whatever consequences the fictions created – The Board rejected the union's arguments and upheld the AG's preliminary motion – Grievances dismissed

TOM JONES & SONS LIMITED; TOM JONES CORPORATION AND TOM JONES CONSTRUCTION INC.; RE IBEW LOCAL 402; RE ATTORNEY GENERAL OF ONTARIO, LISGAR CONSTRUCTION CO., ET AL ..... (Mar/Apr) 391

Construction Industry – Delay – Related Employer – The unions' bargaining rights were derived from collective agreements signed in 1977 in respect of a business that two partners, A and Z, ran – A left the business in 1982 and operated a new one, Quinte, continuously from then until these applications – After reviewing *KNK* and *Somerville* the Board determined that too much time had elapsed for there to be any protection of bargaining rights that arguably arose in 1982 in a scenario where the employer had operated openly and consistently since that time with what is now a significant workforce – Accordingly the Board determined that it would not exercise its discretion in favour of the unions – Application dismissed

ZANETTE & ALMEIDA PLASTERING COMPANY LIMITED; RE IUPAT, LOCAL 1891 ..... (Mar/Apr) 414

Construction Industry Grievance – Constitutional Law – The IBEW referred three grievances to the Board and at the same time challenged the validity of earlier legislation that effectively wiped out longstanding bargaining rights by legislative fiat – The Attorney General of Ontario brought a preliminary motion to have the grievances dismissed because the constitutional challenges were predicated on the impermissible retroactive application of a Supreme Court of Canada decision in 2007 (*Health Sciences*) to legislation that had been spent or repealed long before (in 2001) – The issue concerned the legislation creating province-wide bargaining (1978) and its subsequent "deemed abandonment" (2001) and whether the Board could ascribe the Charter right to collective bargaining to a time *before* the SCC had found such a right to exist – The union sought to argue that the legal fictions created by the legislation (or removed by it) necessarily made court-made changes to the law (i.e., the recognition of the right to collective bargaining) applicable to whatever consequences the fictions created – The Board rejected the union's arguments and upheld the AG's preliminary motion – Grievances dismissed

TOM JONES & SONS LIMITED; TOM JONES CORPORATION AND TOM JONES CONSTRUCTION INC.; RE IBEW LOCAL 402; RE ATTORNEY GENERAL OF ONTARIO, LISGAR CONSTRUCTION CO., ET AL ..... (Mar/Apr) 391

Construction Industry Grievance – Practice and Procedure – When a first grievance was dismissed by the Board on the basis of a preliminary motion brought by the responding party (an improper filing contrary to earlier Minutes of Settlement that required the OPDC alone, or the OPDC *and* a Local to initiate a grievance against the responding party), LIUNA OPDC and Local 183 immediately launched a second grievance – The Board considered whether it should accept the grievance referral – The responding party asserted the grievance ought to be dismissed as an abuse of process or on the basis of the doctrine of *res judicata* because the two applicants had the opportunity to litigate the issues in dispute in the context of the first grievance – The applicants argued that the second grievance is properly before the Board because the parties had not been in agreement in their interpretation of the effect of the Minutes of Settlement; the Board in fact had to make that threshold ruling before the merits of the grievance could be addressed – Since the applicants lost the first grievance on a preliminary motion, the launching of the second grievance could not be said to violate the principles of judicial economy, finality and the integrity of the administration of justice – The Board held that the doctrine of *res judicata* was inapplicable to the circumstances of this proceeding; however the doctrine of abuse of process and the Board's discretion to accept a grievance referral led the Board to a different conclusion – The Board held that it ought not readily grant a party an opportunity to cooper up a deficient application in circumstances where the deficiency was one that could have been avoided with due care in the first place – Application dismissed

PNR RAILWORKS INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL WITH ITS AFFILIATED LOCAL UNION, UNIVERSAL WORKERS UNION, L.I.U.N.A. LOCAL 183 ..... (Mar/Apr) 365

Delay – Construction Industry – Related Employer – The unions' bargaining rights were derived from collective agreements signed in 1977 in respect of a business that two partners, A and Z, ran – A left the business in 1982 and operated a new one, Quinte, continuously from then until these applications – After reviewing *KNK* and *Somerville* the Board determined that too much time had elapsed for there to be any protection of bargaining rights that arguably arose in 1982 in a scenario where the employer had operated openly and consistently since that time with what is now a significant workforce – Accordingly

the Board determined that it would not exercise its discretion in favour of the unions – Application dismissed

ZANETTE & ALMEIDA PLASTERING COMPANY LIMITED; RE IUPAT, LOCAL 1891 ..... (Mar/Apr) 414

Discharge – Employment Standards Reprisal – The employee, who sold newspaper subscriptions door-to-door and was paid on a straight commission basis, applied for review of a refusal to issue an order for payment of minimum wage – She had signed a contract that described her as an independent contractor, and was terminated one day after she sought payment of minimum hourly wages – The employer asserted she was terminated for failure to produce adequate sales – The Board considered whether the worker was an independent contractor or an employee – The Board also looked at whether the commissioned salesperson exemption to minimum wage and vacation pay under section 2(1)(h) of Ont. Reg. 285/01 of the *Employment Standards Act, 2000* applied, or if the exception to the exemption for a "route salesperson" applied – It was also determined if a reprisal under section 74(1) of the *Act* had occurred in the circumstances – The worker was found to be an employee, not an independent contractor, because the employer exercised substantial control over her activities: the employee was picked up along with other "team members" each day and dropped off in an assigned neighbourhood; she was given a list of non-subscribers on particular streets in the neighbourhood to solicit; the list was collected by the employer at the end of the week; the employee was given a script of what to say to potential customers; she could not negotiate the percentage of commission she earned, and could not increase her ability to earn by doing work at times or in neighbourhoods other than determined by the employer – The Board also found the employee was a "route salesperson" and not a commissioned salesperson exempt from minimum hourly wage and vacation pay provisions of the *Act* – The Board also determined the employer had not discharged its onus under section 74 of the *Act* and a reprisal had occurred – The employer had terminated the employee's employment one day after her written request that she be paid minimum wage – In addition to minimum hourly wage pay and vacation pay, the Board awarded the employee two months of pay for the time it took her to find a new job, and one month of wages for loss of reasonable expectation of employment – Application allowed

P & L CORPORATION LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE DEENA SCHILLER..... (Mar/Apr) 344

Duty of Fair Representation – Remedies – A previous decision found the union had violated its duty of fair representation in arbitrarily dealing with the applicant's discharge grievance – The Board considered the appropriate remedy in light of an arbitrator's decision that determined the grievance at issue was not arbitrable because of the untimely reference to arbitration by the union – The employer argued that a referral to arbitration would be contrary to *Windsor Western* – The Board found however there had been no decision on the merits by the arbitrator (only a decision that he did not have jurisdiction to hear the grievance) – The Board, having found the reason the grievance was untimely was due to the union's breach of the duty of fair representation, determined that in order for the applicant to be restored to a position he would have been in but for the union's breach, the Board must be able to direct the grievance to be arbitrated on the merits – The Board ordered the intervenor to waive any objection to time limits and the union to take the grievance to arbitration for a determination on its merits – The Board denied the applicant's request to retain counsel of his choice to represent him at the union's expense at the arbitration hearing, finding the union's relationship with the applicant was not so strained that the arbitration could not proceed in the normal course – The Board remained

seized to deal with the apportionment of any compensation awarded pursuant to the arbitration award between the union and the employer

TOBIAS HOUSE ATTENDANT CARE INC.; RE ANONYMOUS APPLICANT & CAW-CANADA, AND ITS LOCAL 40 ..... (Mar/Apr) 382

Employment Standards Discharge – Reprisal The employee, who sold newspaper subscriptions door-to-door and was paid on a straight commission basis, applied for review of a refusal to issue an order for payment of minimum wage – She had signed a contract that described her as an independent contractor, and was terminated one day after she sought payment of minimum hourly wages – The employer asserted she was terminated for failure to produce adequate sales – The Board considered whether the worker was an independent contractor or an employee – The Board also looked at whether the commissioned salesperson exemption to minimum wage and vacation pay under section 2(1)(h) of Ont. Reg. 285/01 of the *Employment Standards Act, 2000* applied, or if the exception to the exemption for a "route salesperson" applied – It was also determined if a reprisal under section 74(1) of the *Act* had occurred in the circumstances – The worker was found to be an employee, not an independent contractor, because the employer exercised substantial control over her activities: the employee was picked up along with other "team members" each day and dropped off in an assigned neighbourhood; she was given a list of non-subscribers on particular streets in the neighbourhood to solicit; the list was collected by the employer at the end of the week; the employee was given a script of what to say to potential customers; she could not negotiate the percentage of commission she earned, and could not increase her ability to earn by doing work at times or in neighbourhoods other than determined by the employer – The Board also found the employee was a "route salesperson" and not a commissioned salesperson exempt from minimum hourly wage and vacation pay provisions of the *Act* – The Board also determined the employer had not discharged its onus under section 74 of the *Act* and a reprisal had occurred – The employer had terminated the employee's employment one day after her written request that she be paid minimum wage – In addition to minimum hourly wage pay and vacation pay, the Board awarded the employee two months of pay for the time it took her to find a new job, and one month of wages for loss of reasonable expectation of employment – Application allowed

P & L CORPORATION LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE DEENA SCHILLER ..... (Mar/Apr) 344

Employment Standards – Judicial Review – Remedies – Judicial review of Board decision ([2011] OLRB Rep. May/June 389) finding that criteria to exempt directors from liability for employee wages under s. 80(4) of the *Employment Standards Act, 2000* was to be read conjunctively and not disjunctively – The applicant was a director of a Nova Scotia corporation that carried on business in Ontario and had employees in Ontario – When the corporation went bankrupt, an Employment Standards Officer issued an Order to pay against the applicant director, as the corporation had no assets for distribution – On review the Board held that in light of the Act's remedial objectives, s. 80(4) must be read conjunctively in order to prevent employers from circumventing the Act by incorporating outside Ontario – The applicant argued this conclusion was contrary to courts' prior application of s. 80(4), which it submitted was binding on the Board – The Divisional Court held the standard of review was reasonableness in light of the Board's expertise under its home statute and without considering the effect of the prior court decisions, the Divisional Court found the Board's decision to be reasonable – With respect to the impact of the prior court decisions, the Divisional Court held that because the aspect of those decisions involving s. 80(4) was neither thorough nor focused on the issue of

conjunctive versus disjunctive interpretation, the fact that the Board declined to follow those court decisions did not make what was a reasonable decision, otherwise unreasonable – This conclusion was bolstered by the Board's expertise interpreting its home statute – Judicial review dismissed

SANFORD PENSLER, A DIRECTOR OF KOREX DON VALLEY ULC; RE TED ADAMS AND OTHERS; COMMUNICATION, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 132, ONTARIO (MINISTRY OF LABOUR DIRECTOR OF EMPLOYMENT STANDARDS) AND OLRB..... (Mar/Apr) 424

Employment Standards – Remedies – City of Toronto's non-union compensation program provided for annual performance-based payments equal to 3% of earnings and market-rate COLA salary adjustments, both subject to City Council budgetary approval – City Council gave approval for the 2008 reporting year but cancelled the program for 2009 midway through the reporting year – The Employment Standards Officer found that because both lump-sum payments were linked to hour, production and efficiency, they were "wages" for the purposes of the Act, however issued an Order to Pay only for performance-based bonus earned in 2008 reporting year – Employees applied for review seeking payments from 2009 as well as COLA payment from 2008 – The Board held that City Council budgetary approval was an insurmountable pre-condition to entitlement for payments under the program – The Board declined to award payment or pro-rated payment for 2009 as, unlike in 2008, the absence of budgetary approval meant that employees' entitlement had not yet vested – The Board found no fundamental change to terms and conditions of employment as the City had given proper notice of the change to employees – The Board declined to award payments for COLA as a proper reading of the non-union compensation plan indicated that budgetary approval from City Council was also required – Although abstractly characterized as "wages" under the Act, the non-union compensation program payments did not become "outstanding wages" until entitlement had properly vested – Applications for review dismissed

CITY OF TORONTO AND DIRECTOR OF EMPLOYMENT STANDARDS, ET AL; RE RAMIN SARRAMI..... (Mar/Apr) 295

Employment Standards – The employee sought an order for termination pay – The employer, Student Media, was in a contractual relationship with Campus Publications to solicit advertising for various university and college publications – Each company had its own employees, payroll, management, etc. – When the relationship between SM and CP soured and CP undertook to do its own solicitation work, SM gave notice to its employees and subsequently laid them off before the notice period had expired – SM argued that the two companies were related, or that there had been a sale of business from SM to CP when CP took over the contract sales, so the two companies, at the very least, were jointly liable for the termination pay – The Board found no evidence of association or relatedness between the companies, and no sale of anything more than assets (if at all) – Application allowed; termination pay ordered

PAUL TIMOTHY BAKER O/A STUDENT MEDIA SERVICES INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE JENNIFER POLAK ..... (Mar/Apr) 351

First Contract Arbitration – Adjournment – Practice and Procedure – Termination – Unfair Labour Practice – Subsequent to the PRCO filing an application under s. 43 a decertification application was filed – The Board found that while s. 43(2) clearly establishes that it is the Legislature's intention that applications for first contract arbitration be determined expeditiously, the language was directory not mandatory –

Furthermore, although nothing in the statute clearly states that subsection 43(2) is subject to subsection 43(23.1), it is the only reasonable interpretation that the language of that subsection can be given without reading it entirely out of the Act – Finally, the Board considered the words "dealing with or continuing to deal with" in s. 43(23.2) and found that ss 43(23.3) and 43(23.4), at the very least, establish that the Board cannot determine the outcome of an application for first contract arbitration until such time as the decertification application has been determined – Finally, the Board rejected PRCO's alternative request that the decertification and first contract arbitration applications be heard together – In the Board's view the section restricts the Board from proceeding with or dealing with the first contract arbitration which must mean that the Board is not to take any steps towards determining the outcome of the application for first contract arbitration until the decertification application has been dealt with – Matters continue

ALAMO PLUMBING & DRAIN SPECIALISTS INC.; RE PLUMBERS RESIDENTIAL COUNCIL, ONTARIO ..... (Mar/Apr) 291

Health and Safety – Settlement – An application was made by an employee pursuant to Section 50 of the *Occupational Health and Safety Act* – An oral agreement in principle was reached – The employee's counsel sent a letter to the Board requesting the scheduled hearing date be adjourned because an "agreement in principle" had been reached – However, the employee disagreed with some of the terms of the drafted settlement and did not sign the Minutes of Settlement – The employee retained new counsel and sought to have the matter re-listed – The employer argued that the matter had been settled – The employee submitted subsection 96(7) of the *Labour Relations Act* required a binding settlement agreement to be in writing and to be signed by the parties or their representatives – The Board found that section 50(3) of the OHSA gives the Board discretion to decline to inquire into a complaint – This discretion is not qualified by subsection 96(7) of the LRA, which provides an enforcement mechanism for settlements – The Board noted that even an oral settlement may result in the Board declining to inquire further into a complaint – The Board found the matter had been resolved by the parties, as confirmed by the letter sent to the Board by the original counsel for the employee – Counsel can bind a client to a settlement unless the client has limited his or her authority and the opposing side has knowledge of the limitation – There was no reason for the Board to look behind the settlement – The Board exercised its discretion not to inquire further into the complaint because it had been settled – Application denied .

ESTÉE LAUDER COSMETICS LIMITED; RE WINSTON H. GREGORY .... (Mar/Apr) 330

Health and Safety – The issue under appeal was whether receptacle portion of a specific solar energy connector was a "convenience receptacle" within the meaning of an exemption to s. 182 of the Construction Regulations – If not, then only a certified electrician or apprentice could connect the connector – The inspector's order did not require an electrician to perform the task; the IBEW appealed – The IBEW argued that the regulatory history established that a "convenience receptacle" meant a standard 120 volt AC power source into which power tools were plugged. The solar energy connector was not a standard AC power outlet and did not have its characteristics - Among other things, it was not a power source but part of the process of wiring connections to create a power generating device – The Board rejected these arguments, holding that the exemption was not limited to plugging in "power tools" but included plugging in "electrical equipment" There was nothing in the wording of the current exemption which restricted it to power sources - Convenience ordinarily connotes ease of use; a convenience receptacle is one that is designed to accept a plug cap without any further work in order to effect the connection - The hazards associated with such other work are thus avoided by the design

of the plug and the receptacles themselves The characteristics of a solar energy connector were such that, if anything, it was safer to use than a standard 120 volt power outlet – Accordingly, the specialized skills of an electrician were not required to make the connection - Appeal denied

GIL & SONS LIMITED AND FIL SAVOIA, REGIONAL DIRECTOR; RE IBEW LOCAL 530, FIRST SOLAR DEVELOPMENT (CANADA) INC. ..... (Mar/Apr) 336

Judicial Review – Employment Standards – Remedies – Judicial review of Board decision ([2011] OLRB Rep. May/June 389) finding that criteria to exempt directors from liability for employee wages under s. 80(4) of the *Employment Standards Act, 2000* was to be read conjunctively and not disjunctively – The applicant was a director of a Nova Scotia corporation that carried on business in Ontario and had employees in Ontario – When the corporation went bankrupt, an Employment Standards Officer issued an Order to pay against the applicant director, as the corporation had no assets for distribution – On review the Board held that in light of the Act's remedial objectives, s. 80(4) must be read conjunctively in order to prevent employers from circumventing the Act by incorporating outside Ontario – The applicant argued this conclusion was contrary to courts' prior application of s. 80(4), which it submitted was binding on the Board – The Divisional Court held the standard of review was reasonableness in light of the Board's expertise under its home statute and without considering the effect of the prior court decisions, the Divisional Court found the Board's decision to be reasonable – With respect to the impact of the prior court decisions, the Divisional Court held that because the aspect of those decisions involving s. 80(4) was neither thorough nor focused on the issue of conjunctive versus disjunctive interpretation, the fact that the Board declined to follow those court decisions did not make what was a reasonable decision, otherwise unreasonable – This conclusion was bolstered by the Board's expertise interpreting its home statute – Judicial review dismissed

SANFORD PENSLER, A DIRECTOR OF KOREX DON VALLEY ULC; RE TED ADAMS AND OTHERS; COMMUNICATION, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 132, ONTARIO (MINISTRY OF LABOUR DIRECTOR OF EMPLOYMENT STANDARDS) AND OLRB..... (Mar/Apr) 424

Practice and Procedure – Adjournment – First Contract Arbitration – Termination – Unfair Labour Practice Subsequent to the PRCO filing an application under s. 43 a decertification application was filed – The Board found that while s. 43(2) clearly establishes that it is the Legislature's intention that applications for first contract arbitration be determined expeditiously, the language was directory not mandatory – Furthermore, although nothing in the statute clearly states that subsection 43(2) is subject to subsection 43(23.1), it is the only reasonable interpretation that the language of that subsection can be given without reading it entirely out of the Act – Finally, the Board considered the words "dealing with or continuing to deal with" in s. 43(23.2) and found that ss 43(23.3) and 43(23.4), at the very least, establish that the Board cannot determine the outcome of an application for first contract arbitration until such time as the decertification application has been determined – Finally, the Board rejected PRCO's alternative request that the decertification and first contract arbitration applications be heard together – In the Board's view the section restricts the Board from proceeding with or dealing with the first contract arbitration which must mean that the Board is not to take any steps towards determining the outcome of the application for first contract arbitration until the decertification application has been dealt with – Matters continue

ALAMO PLUMBING & DRAIN SPECIALISTS INC.; RE PLUMBERS RESIDENTIAL COUNCIL, ONTARIO ..... (Mar/Apr) 291

Practice and Procedure – Construction Industry Grievance – When a first grievance was dismissed by the Board on the basis of a preliminary motion brought by the responding party (an improper filing contrary to earlier Minutes of Settlement that required the OPDC alone, or the OPDC *and* a Local to initiate a grievance against the responding party), LIUNA OPDC and Local 183 immediately launched a second grievance – The Board considered whether it should accept the grievance referral – The responding party asserted the grievance ought to be dismissed as an abuse of process or on the basis of the doctrine of *res judicata* because the two applicants had the opportunity to litigate the issues in dispute in the context of the first grievance – The applicants argued that the second grievance is properly before the Board because the parties had not been in agreement in their interpretation of the effect of the Minutes of Settlement; the Board in fact had to make that threshold ruling before the merits of the grievance could be addressed – Since the applicants lost the first grievance on a preliminary motion, the launching of the second grievance could not be said to violate the principles of judicial economy, finality and the integrity of the administration of justice – The Board held that the doctrine of *res judicata* was inapplicable to the circumstances of this proceeding; however the doctrine of abuse of process and the Board's discretion to accept a grievance referral led the Board to a different conclusion – The Board held that it ought not readily grant a party an opportunity to cooper up a deficient application in circumstances where the deficiency was one that could have been avoided with due care in the first place – Application dismissed

PNR RAILWORKS INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL WITH ITS AFFILIATED LOCAL UNION, UNIVERSAL WORKERS UNION, L.I.U.N.A. LOCAL 183 ..... (Mar/Apr) 365

Related Employer – Construction Industry – Delay – The unions' bargaining rights were derived from collective agreements signed in 1977 in respect of a business that two partners, A and Z, ran – A left the business in 1982 and operated a new one, Quinte, continuously from then until these applications – After reviewing *KNK* and *Somerville* the Board determined that too much time had elapsed for there to be any protection of bargaining rights that arguably arose in 1982 in a scenario where the employer had operated openly and consistently since that time with what is now a significant workforce – Accordingly the Board determined that it would not exercise its discretion in favour of the unions – Application dismissed

ZANETTE & ALMEIDA PLASTERING COMPANY LIMITED; RE IUPAT, LOCAL 1891 ..... (Mar/Apr) 414

Remedies – Duty Of Fair Representation – A previous decision found the union had violated its duty of fair representation in arbitrarily dealing with the applicant's discharge grievance – The Board considered the appropriate remedy in light of an arbitrator's decision that determined the grievance at issue was not arbitrable because of the untimely reference to arbitration by the union – The employer argued that a referral to arbitration would be contrary to *Windsor Western* – The Board found however there had been no decision on the merits by the arbitrator (only a decision that he did not have jurisdiction to hear the grievance) – The Board, having found the reason the grievance was untimely was due to the union's breach of the duty of fair representation, determined that in order for the applicant to be restored to a position he would have been in but for the union's breach, the Board must be able to direct the grievance to be arbitrated on the merits – The

Board ordered the intervenor to waive any objection to time limits and the union to take the grievance to arbitration for a determination on its merits – The Board denied the applicant's request to retain counsel of his choice to represent him at the union's expense at the arbitration hearing, finding the union's relationship with the applicant was not so strained that the arbitration could not proceed in the normal course – The Board remained seized to deal with the apportionment of any compensation awarded pursuant to the arbitration award between the union and the employer

TOBIAS HOUSE ATTENDANT CARE INC.; RE ANONYMOUS APPLICANT & CAW-CANADA, AND ITS LOCAL 40 ..... (Mar/Apr) 382

Remedies – Employment Standards – City of Toronto's non-union compensation program provided for annual performance-based payments equal to 3% of earnings and market-rate COLA salary adjustments, both subject to City Council budgetary approval – City Council gave approval for the 2008 reporting year but cancelled the program for 2009 midway through the reporting year – The Employment Standards Officer found that because both lump-sum payments were linked to hour, production and efficiency, they were "wages" for the purposes of the Act, however issued an Order to Pay only for performance-based bonus earned in 2008 reporting year – Employees applied for review seeking payments from 2009 as well as COLA payment from 2008 – The Board held that City Council budgetary approval was an insurmountable pre-condition to entitlement for payments under the program – The Board declined to award payment or pro-rated payment for 2009 as, unlike in 2008, the absence of budgetary approval meant that employees' entitlement had not yet vested – The Board found no fundamental change to terms and conditions of employment as the City had given proper notice of the change to employees – The Board declined to award payments for COLA as a proper reading of the non-union compensation plan indicated that budgetary approval from City Council was also required – Although abstractly characterized as "wages" under the Act, the non-union compensation program payments did not become "outstanding wages" until entitlement had properly vested – Applications for review dismissed

CITY OF TORONTO AND DIRECTOR OF EMPLOYMENT STANDARDS, ET AL; RE RAMIN SARRAMI ..... (Mar/Apr) 295

Remedies – Employment Standards – Judicial Review – Judicial review of Board decision ([2011] OLRB Rep. May/June 389) finding that criteria to exempt directors from liability for employee wages under s. 80(4) of the *Employment Standards Act, 2000* was to be read conjunctively and not disjunctively – The applicant was a director of a Nova Scotia corporation that carried on business in Ontario and had employees in Ontario – When the corporation went bankrupt, an Employment Standards Officer issued an Order to pay against the applicant director, as the corporation had no assets for distribution – On review the Board held that in light of the Act's remedial objectives, s. 80(4) must be read conjunctively in order to prevent employers from circumventing the Act by incorporating outside Ontario – The applicant argued this conclusion was contrary to courts' prior application of s. 80(4), which it submitted was binding on the Board – The Divisional Court held the standard of review was reasonableness in light of the Board's expertise under its home statute and without considering the effect of the prior court decisions, the Divisional Court found the Board's decision to be reasonable – With respect to the impact of the prior court decisions, the Divisional Court held that because the aspect of those decisions involving s. 80(4) was neither thorough nor focused on the issue of conjunctive versus disjunctive interpretation, the fact that the Board declined to follow those court decisions did not make what was a reasonable decision, otherwise

unreasonable – This conclusion was bolstered by the Board's expertise interpreting its home statute – Judicial review dismissed

SANFORD PENSLER, A DIRECTOR OF KOREX DON VALLEY ULC; RE TED ADAMS AND OTHERS; COMMUNICATION, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 132, ONTARIO (MINISTRY OF LABOUR – DIRECTOR OF EMPLOYMENT STANDARDS) AND OLRB..... (Mar/Apr) 424

Reprisal – Employment Standards Discharge – The employee, who sold newspaper subscriptions door-to-door and was paid on a straight commission basis, applied for review of a refusal to issue an order for payment of minimum wage – She had signed a contract that described her as an independent contractor, and was terminated one day after she sought payment of minimum hourly wages – The employer asserted she was terminated for failure to produce adequate sales – The Board considered whether the worker was an independent contractor or an employee – The Board also looked at whether the commissioned salesperson exemption to minimum wage and vacation pay under section 2(1)(h) of Ont. Reg. 285/01 of the *Employment Standards Act, 2000* applied, or if the exception to the exemption for a "route salesperson" applied – It was also determined if a reprisal under section 74(1) of the *Act* had occurred in the circumstances – The worker was found to be an employee, not an independent contractor, because the employer exercised substantial control over her activities: the employee was picked up along with other "team members" each day and dropped off in an assigned neighbourhood; she was given a list of non-subscribers on particular streets in the neighbourhood to solicit; the list was collected by the employer at the end of the week; the employee was given a script of what to say to potential customers; she could not negotiate the percentage of commission she earned, and could not increase her ability to earn by doing work at times or in neighbourhoods other than determined by the employer – The Board also found the employee was a "route salesperson" and not a commissioned salesperson exempt from minimum hourly wage and vacation pay provisions of the *Act* – The Board also determined the employer had not discharged its onus under section 74 of the *Act* and a reprisal had occurred – The employer had terminated the employee's employment one day after her written request that she be paid minimum wage In addition to minimum hourly wage pay and vacation pay, the Board awarded the employee two months of pay for the time it took her to find a new job, and one month of wages for loss of reasonable expectation of employment – Application allowed

P & L CORPORATION LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE DEENA SCHILLER..... (Mar/Apr) 344

Settlement – Health and Safety – An application was made by an employee pursuant to Section 50 of the *Occupational Health and Safety Act* – An oral agreement in principle was reached – The employee's counsel sent a letter to the Board requesting the scheduled hearing date be adjourned because an "agreement in principle" had been reached – However, the employee disagreed with some of the terms of the drafted settlement and did not sign the Minutes of Settlement – The employee retained new counsel and sought to have the matter re-listed – The employer argued that the matter had been settled – The employee submitted subsection 96(7) of the *Labour Relations Act* required a binding settlement agreement to be in writing and to be signed by the parties or their representatives – The Board found that section 50(3) of the OHSA gives the Board discretion to decline to inquire into a complaint – This discretion is not qualified by subsection 96(7) of the LRA, which provides an enforcement mechanism for settlements – The Board noted that even an oral settlement may result in the Board declining to inquire further into a complaint – The Board found the matter had been resolved by the

parties, as confirmed by the letter sent to the Board by the original counsel for the employee – Counsel can bind a client to a settlement unless the client has limited his or her authority and the opposing side has knowledge of the limitation – There was no reason for the Board to look behind the settlement – The Board exercised its discretion not to inquire further into the complaint because it had been settled – Application denied

ESTÉE LAUDER COSMETICS LIMITED; RE WINSTON H. GREGORY .... (Mar/Apr) 330

Termination – Adjournment – First Contract Arbitration – Practice and Procedure – Unfair Labour Practice – Subsequent to the PRCO filing an application under s. 43 a decertification application was filed – The Board found that while s. 43(2) clearly establishes that it is the Legislature's intention that applications for first contract arbitration be determined expeditiously, the language was directory not mandatory – Furthermore, although nothing in the statute clearly states that subsection 43(2) is subject to subsection 43(23.1), it is the only reasonable interpretation that the language of that subsection can be given without reading it entirely out of the Act – Finally, the Board considered the words "dealing with or continuing to deal with" in s. 43(23.2) and found that ss 43(23.3) and 43(23.4), at the very least, establish that the Board cannot determine the outcome of an application for first contract arbitration until such time as the decertification application has been determined – Finally, the Board rejected PRCO's alternative request that the decertification and first contract arbitration applications be heard together – In the Board's view the section restricts the Board from proceeding with or dealing with the first contract arbitration which must mean that the Board is not to take any steps towards determining the outcome of the application for first contract arbitration until the decertification application has been dealt with – Matters continue

ALAMO PLUMBING & DRAIN SPECIALISTS INC.; RE PLUMBERS RESIDENTIAL COUNCIL, ONTARIO ..... (Mar/Apr) 291

Unfair Labour Practice – Adjournment – First Contract Arbitration – Practice and Procedure – Termination – Subsequent to the PRCO filing an application under s. 43 a decertification application was filed – The Board found that while s. 43(2) clearly establishes that it is the Legislature's intention that applications for first contract arbitration be determined expeditiously, the language was directory not mandatory – Furthermore, although nothing in the statute clearly states that subsection 43(2) is subject to subsection 43(23.1), it is the only reasonable interpretation that the language of that subsection can be given without reading it entirely out of the Act – Finally, the Board considered the words "dealing with or continuing to deal with" in s. 43(23.2) and found that ss 43(23.3) and 43(23.4), at the very least, establish that the Board cannot determine the outcome of an application for first contract arbitration until such time as the decertification application has been determined – Finally, the Board rejected PRCO's alternative request that the decertification and first contract arbitration applications be heard together – In the Board's view the section restricts the Board from proceeding with or dealing with the first contract arbitration which must mean that the Board is not to take any steps towards determining the outcome of the application for first contract arbitration until the decertification application has been dealt with – Matters continue

ALAMO PLUMBING & DRAIN SPECIALISTS INC.; RE PLUMBERS RESIDENTIAL COUNCIL, ONTARIO ..... (Mar/Apr) 291

Unfair Labour Practice – Five former executive members of LIUNA Local 183 sought relief from the Board following their ouster from office after a closely-fought election – The roster of incumbents was defeated, and the newly-elected executive expelled the five

from membership and discharged another fifty Local 183 employees – A recount and internal review of the election process was conducted, with no findings of impropriety – The Board reviewed the long and storied history of Local 183's relationship with its parent, the factional disputes, court actions and earlier Board proceedings that document much of the events which underlay the present complaints – The Board gave consideration to the responding parties' motions for dismissal, including issue estoppel, abuse of process, timeliness and Board discretion – The Board acknowledged that while there was an arguable case for a finding of a breach of the Act, having regard to the parties' history, and the nature and utility of the remedy sought by the applicants (including the prospect of resurrecting much of the earlier litigation between the parties), there would be little labour relations purpose served by proceeding with the complaints to completion, especially when the relief sought would become unavailable before the litigation was completed – Application dismissed

DURVAL TERCEIRA, JAIME MELO, MICHAEL O'BRIEN, GAETANO STRAZZANTI AND CESAR DANIEL AVERO; RE LIUNA, UNIVERSAL WORKERS UNION – LIUNA, LOCAL 183; RONALD A. PINK, Q.C. ..... (Mar/Apr) 302

Bar – Certification – Collective Agreement – Constitutional Law – Construction Industry – Employer Support – Timeliness – On the agreed statement of facts there was no dispute that the employer was involved, from time to time, in the installation of new poles, conduit, fibre optic cable, copper cable in new residential subdivisions and this work included the digging and backfilling of trenches, the laying of conduit, the pulling of cable, the replacing and installing of junction boxes and pedestals and bases and the stringing of lines on poles – The Board noted that even if the principal business of the employer is not in the construction industry, if the employer only occasionally or intermittently engages in construction industry work it is enough for the employer to be found to be an employer in the construction industry – The Board found it difficult to conceive the work as being anything other than construction and noted that the attempt to argue the work was maintenance failed since the installation of new telecommunication infrastructure to expand the Bell network can no more be characterized as maintenance than the building of a new highway can be characterized as maintenance to the Province's existing highway system – Fifteen months prior to these applications the employees' Association and the employer renegotiated their collective agreement mid-term and entered into a second one (ratified by the employees) without jointly seeking the Board's consent – The Board reviewed its case law under s. 58(3) noting that the statute explicitly requires that private arrangements to terminate a collective agreement early be monitored and supervised by the Board, which would remove any possibility of other employees or trade unions arguing that the prior arrangements of the parties were inadequate – The Board rejected an argument that the section was somehow discretionary, finding that if a collective agreement shall not be terminated by the parties before it ceases to operate without the consent of the Board, and the Board's consent has not been granted (let alone even been sought), the collective agreement cannot be terminated – Accordingly, the second collective agreement was not a bar to the applications – Finally the Board dealt with the Association's late submissions that the matter was federal (given the work was for Bell) and not within the Board's jurisdiction – For a number of reasons the Board refused to entertain this motion, including that the employer knew the facts underlying the constitutional issue and failed to raise them in a timely fashion and no notice was provided to the Attorneys General pursuant to the Board's Rules or the *Courts of Justice Act* – Alternatively, assuming it was wrong not to entertain the constitutional question, the Board found that the matter was within provincial jurisdiction relying on a number of cases that noted a general construction company whether building an airport or a

telephone line has only a "casual" (in the words of the jurisprudence) relationship with its federal customers which cannot alter the constitutional authority over its regular line of business – Accordingly, if required, the Board found the activities of Expercom to be subject to provincial regulation

EXPERCOM TELECOMMUNICATIONS INC.; RE L.I.U.N.A., LOCAL 24; RE PORT PERRY EMPLOYEES ASSOCIATION..... (May/Jun) 445

Certification – Bar – Collective Agreement – Constitutional Law – Construction Industry – Employer Support – Timeliness – On the agreed statement of facts there was no dispute that the employer was involved, from time to time, in the installation of new poles, conduit, fibre optic cable, copper cable in new residential subdivisions and this work included the digging and backfilling of trenches, the laying of conduit, the pulling of cable, the replacing and installing of junction boxes and pedestals and bases and the stringing of lines on poles – The Board noted that even if the principal business of the employer is not in the construction industry, if the employer only occasionally or intermittently engages in construction industry work it is enough for the employer to be found to be an employer in the construction industry – The Board found it difficult to conceive the work as being anything other than construction and noted that the attempt to argue the work was maintenance failed since the installation of new telecommunication infrastructure to expand the Bell network can no more be characterized as maintenance than the building of a new highway can be characterized as maintenance to the Province's existing highway system – Fifteen months prior to these applications the employees' Association and the employer renegotiated their collective agreement mid-term and entered into a second one (ratified by the employees) without jointly seeking the Board's consent – The Board reviewed its case law under s. 58(3) noting that the statute explicitly requires that private arrangements to terminate a collective agreement early be monitored and supervised by the Board, which would remove any possibility of other employees or trade unions arguing that the prior arrangements of the parties were inadequate – The Board rejected an argument that the section was somehow discretionary, finding that if a collective agreement shall not be terminated by the parties before it ceases to operate without the consent of the Board, and the Board's consent has not been granted (let alone even been sought), the collective agreement cannot be terminated – Accordingly, the second collective agreement was not a bar to the applications – Finally the Board dealt with the Association's late submissions that the matter was federal (given the work was for Bell) and not within the Board's jurisdiction – For a number of reasons the Board refused to entertain this motion, including that the employer knew the facts underlying the constitutional issue and failed to raise them in a timely fashion and no notice was provided to the Attorneys General pursuant to the Board's Rules or the *Courts of Justice Act* – Alternatively, assuming it was wrong not to entertain the constitutional question, the Board found that the matter was within provincial jurisdiction relying on a number of cases that noted a general construction company whether building an airport or a telephone line has only a "casual" (in the words of the jurisprudence) relationship with its federal customers which cannot alter the constitutional authority over its regular line of business – Accordingly, if required, the Board found the activities of Expercom to be subject to provincial regulation

EXPERCOM TELECOMMUNICATIONS INC.; RE L.I.U.N.A., LOCAL 24; RE PORT PERRY EMPLOYEES ASSOCIATION..... (May/Jun) 445

Certification – Construction Industry – Intimidation and Coercion – Representation Vote – Unfair Labour Practice – The employer alleged that during an organizing campaign certain union organizers told individuals that if they joined the union now they would

have to pay $50 to join, whereas if they joined later it would cost a lot more – The Board noted that there is nothing inappropriate with a trade union having a two-tiered initiation fee structure *provided* the lower initiation fee is made available to all employees of the employer at the time of certification and not only to those who signed an application for membership card in advance of the union's certification – Where individuals are told they will be required to pay more later, the Board is unable to determine if the individuals signed the card because they wanted to join the union or because they wanted to avoid having to make a larger payment – After hearing the evidence of five employees, the Board found each witness to be credible and their evidence to be plausible – The union organizer, who was available, did not testify – Accordingly the Board found that the union organizer had made the alleged statements – The Board found the jurisprudence to be clear: in these situations a cloud is cast over the reliability of the membership evidence – Finally, the Board noted that even though only five employees came forward, the Board was unable to determine the extent to which the employees of the employer were aware of the statements made by the organizer, but inferred that since the organizer collected at least 25% of the cards, the statements were more than likely made to more than five individuals – In these circumstances, given the reliability of the membership evidence was in doubt, the Board found it appropriate to order another representation vote – Application granted; matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE L.I.U.N.A, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE I.U.O.E., LOCAL 793 ..... (May/Jun) 471

Certification – Employer Support – Intimidation and Coercion – *Prima Facie* Motion – Representation Vote – Unfair Labour Practice – The incumbent union, LIUNA Local 1110, lost a certification vote to HOPE Local 2220 by a significant margin – Local 1110 asked the Board to set aside the vote and dismiss the certification application on the basis that what occurred was so harmful that the true wishes of the employees were not disclosed in the vote – On a motion by Local 2220 to dismiss Local 1110's allegations on a *prima facie* basis the Board reviewed its cases dealing with how it will approach allegations of misconduct in the face of a vote which has already been determined, and found that none of the allegations, individually or collectively, would lead the Board to conclude that the true wishes of the employees (in this large and geographically separated bargaining unit) were not reflected in the results of the representation vote which expressed the choice of the employees by over a three to one margin—Accordingly the motion succeeded – Certificate issued

1367178 ONTARIO INC. CARRYING ON THE BUSINESSES KNOWN AS THE CHARTWELL SENIORS HOUSING REIT LONG TERM RESIDENCES, THE WESTMOUNT, THE WOODHAVEN, THE WYNFIELD AND THE WATERFORD; RE HEALTHCARE, OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 2220; RE UBCJA; RE ONTARIO FEDERATION OF HEALTH CARE WORKERS, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1110 .... (May/Jun) 429

Charter of Rights and Freedoms – Construction Industry – Judicial Review – Non-Construction Employer – The Board concluded ([2009] OLRB Rep. Nov/Dec 826) that the declarations required by s. 127.2 when an employer is found to be a non-construction employer substantially interfered with the process of collective bargaining, contrary to s. 2(d) of the *Charter*, and the infringement could not be saved by s. 1 – On judicial review, the Divisional Court found no such infringement ([2010 OLRB Rep. Jan/Feb 166) – On appeal, the Court of Appeal affirmed that freedom of association is enjoyed by individuals not unions – There was no substantial interference with members' s. 2(d)

rights – A s. 127.2 declaration would not make it impossible for the unions' members to meaningfully exercise the freedom to associate – Appeal dismissed

INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059, OLRB AND ATTORNEY GENERAL OF ONTARIO, RE PROVINCIAL BUILDING AND CONSTRUCTION TRADES COUNCIL OF ONTARIO AND GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; OLRB.....(May/Jun) 553

Collective Agreement – Bar – Certification – Constitutional Law – Construction Industry – Employer Support – Timeliness – On the agreed statement of facts there was no dispute that the employer was involved, from time to time, in the installation of new poles, conduit, fibre optic cable, copper cable in new residential subdivisions and this work included the digging and backfilling of trenches, the laying of conduit, the pulling of cable, the replacing and installing of junction boxes and pedestals and bases and the stringing of lines on poles – The Board noted that even if the principal business of the employer is not in the construction industry, if the employer only occasionally or intermittently engages in construction industry work it is enough for the employer to be found to be an employer in the construction industry – The Board found it difficult to conceive the work as being anything other than construction and noted that the attempt to argue the work was maintenance failed since the installation of new telecommunication infrastructure to expand the Bell network can no more be characterized as maintenance than the building of a new highway can be characterized as maintenance to the Province's existing highway system – Fifteen months prior to these applications the employees' Association and the employer renegotiated their collective agreement mid-term and entered into a second one (ratified by the employees) without jointly seeking the Board's consent – The Board reviewed its case law under s. 58(3) noting that the statute explicitly requires that private arrangements to terminate a collective agreement early be monitored and supervised by the Board, which would remove any possibility of other employees or trade unions arguing that the prior arrangements of the parties were inadequate – The Board rejected an argument that the section was somehow discretionary, finding that if a collective agreement shall not be terminated by the parties before it ceases to operate without the consent of the Board, and the Board's consent has not been granted (let alone even been sought), the collective agreement cannot be terminated – Accordingly, the second collective agreement was not a bar to the applications – Finally the Board dealt with the Association's late submissions that the matter was federal (given the work was for Bell) and not within the Board's jurisdiction – For a number of reasons the Board refused to entertain this motion, including that the employer knew the facts underlying the constitutional issue and failed to raise them in a timely fashion and no notice was provided to the Attorneys General pursuant to the Board's Rules or the *Courts of Justice Act* – Alternatively, assuming it was wrong not to entertain the constitutional question, the Board found that the matter was within provincial jurisdiction relying on a number of cases that noted a general construction company whether building an airport or a telephone line has only a "casual" (in the words of the jurisprudence) relationship with its federal customers which cannot alter the constitutional authority over its regular line of business – Accordingly, if required, the Board found the activities of Expercom to be subject to provincial regulation

EXPERCOM TELECOMMUNICATIONS INC.; RE L.I.U.N.A., LOCAL 24; RE PORT PERRY EMPLOYEES ASSOCIATION.....(May/Jun) 445

Conflict of Interest – Between two dates of hearing of an unfair practice complaint, counsel for the applicants accepted employment with the law firm that represented the responding parties – The Board considered whether the lawyer had received confidential information attributable to a solicitor-client relationship and, if so, was there a risk it would be used to the prejudice of the client – Assuming the answer to the first question had to be in the affirmative, the Board then considered whether reasonable measures were taken by the employing firm to ensure that no disclosure would occur by the tainted lawyer to other members of the firm – The measures might include the building of "ethical walls" between lawyers at the firm, monitoring by an independent lawyer, notice to the tainted lawyer's former clients, and the application of the *Rules of Professional Conduct* – The Board held that the steps taken by the responding party's law firm fell short of dispelling a conflict of interest – The law firm was removed as counsel of record for the responding party – Matter continues

OAKVILLE UNITED TAXI; RE MOHAMMAD ASIF BHATT, SHAHID QAYYUM, KHALID QAYYUM KHALIL, HAROON WAHID AND NAZAR HAYAT KHARAL .. .. (May/Jun) 512

Constitutional Law – Bar – Certification – Collective Agreement – Construction Industry – Employer Support – Timeliness – On the agreed statement of facts there was no dispute that the employer was involved, from time to time, in the installation of new poles, conduit, fibre optic cable, copper cable in new residential subdivisions and this work included the digging and backfilling of trenches, the laying of conduit, the pulling of cable, the replacing and installing of junction boxes and pedestals and bases and the stringing of lines on poles – The Board noted that even if the principal business of the employer is not in the construction industry, if the employer only occasionally or intermittently engages in construction industry work it is enough for the employer to be found to be an employer in the construction industry – The Board found it difficult to conceive the work as being anything other than construction and noted that the attempt to argue the work was maintenance failed since the installation of new telecommunication infrastructure to expand the Bell network can no more be characterized as maintenance than the building of a new highway can be characterized as maintenance to the Province's existing highway system – Fifteen months prior to these applications the employees' Association and the employer renegotiated their collective agreement mid-term and entered into a second one (ratified by the employees) without jointly seeking the Board's consent – The Board reviewed its case law under s. 58(3) noting that the statute explicitly requires that private arrangements to terminate a collective agreement early be monitored and supervised by the Board, which would remove any possibility of other employees or trade unions arguing that the prior arrangements of the parties were inadequate – The Board rejected an argument that the section was somehow discretionary, finding that if a collective agreement shall not be terminated by the parties before it ceases to operate without the consent of the Board, and the Board's consent has not been granted (let alone even been sought), the collective agreement cannot be terminated – Accordingly, the second collective agreement was not a bar to the applications – Finally the Board dealt with the Association's late submissions that the matter was federal (given the work was for Bell) and not within the Board's jurisdiction – For a number of reasons the Board refused to entertain this motion, including that the employer knew the facts underlying the constitutional issue and failed to raise them in a timely fashion and no notice was provided to the Attorneys General pursuant to the Board's Rules or the *Courts of Justice Act* – Alternatively, assuming it was wrong not to entertain the constitutional question, the Board found that the matter was within provincial jurisdiction relying on a number of cases that noted a general construction company whether building an airport or a

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EXPERCOM TELECOMMUNICATIONS INC.; RE L.I.U.N.A., LOCAL 24; RE PORT PERRY EMPLOYEES ASSOCIATION ..... (May/Jun) 445

Construction Industry – Bar – Certification – Collective Agreement – Constitutional Law – Employer Support – Timeliness – On the agreed statement of facts there was no dispute that the employer was involved, from time to time, in the installation of new poles, conduit, fibre optic cable, copper cable in new residential subdivisions and this work included the digging and backfilling of trenches, the laying of conduit, the pulling of cable, the replacing and installing of junction boxes and pedestals and bases and the stringing of lines on poles – The Board noted that even if the principal business of the employer is not in the construction industry, if the employer only occasionally or intermittently engages in construction industry work it is enough for the employer to be found to be an employer in the construction industry – The Board found it difficult to conceive the work as being anything other than construction and noted that the attempt to argue the work was maintenance failed since the installation of new telecommunication infrastructure to expand the Bell network can no more be characterized as maintenance than the building of a new highway can be characterized as maintenance to the Province's existing highway system – Fifteen months prior to these applications the employees' Association and the employer renegotiated their collective agreement mid-term and entered into a second one (ratified by the employees) without jointly seeking the Board's consent – The Board reviewed its case law under s. 58(3) noting that the statute explicitly requires that private arrangements to terminate a collective agreement early be monitored and supervised by the Board, which would remove any possibility of other employees or trade unions arguing that the prior arrangements of the parties were inadequate – The Board rejected an argument that the section was somehow discretionary, finding that if a collective agreement shall not be terminated by the parties before it ceases to operate without the consent of the Board, and the Board's consent has not been granted (let alone even been sought), the collective agreement cannot be terminated – Accordingly, the second collective agreement was not a bar to the applications – Finally the Board dealt with the Association's late submissions that the matter was federal (given the work was for Bell) and not within the Board's jurisdiction – For a number of reasons the Board refused to entertain this motion, including that the employer knew the facts underlying the constitutional issue and failed to raise them in a timely fashion and no notice was provided to the Attorneys General pursuant to the Board's Rules or the *Courts of Justice Act* – Alternatively, assuming it was wrong not to entertain the constitutional question, the Board found that the matter was within provincial jurisdiction relying on a number of cases that noted a general construction company whether building an airport or a telephone line has only a "casual" (in the words of the jurisprudence) relationship with its federal customers which cannot alter the constitutional authority over its regular line of business – Accordingly, if required, the Board found the activities of Expercom to be subject to provincial regulation

EXPERCOM TELECOMMUNICATIONS INC.; RE L.I.U.N.A., LOCAL 24; RE PORT PERRY EMPLOYEES ASSOCIATION ..... (May/Jun) 445

Construction Industry – Certification – Intimidation and Coercion – Representation Vote – Unfair Labour Practice – The employer alleged that during an organizing campaign certain union organizers told individuals that if they joined the union now they would

have to pay $50 to join, whereas if they joined later it would cost a lot more – The Board noted that there is nothing inappropriate with a trade union having a two-tiered initiation fee structure *provided* the lower initiation fee is made available to all employees of the employer at the time of certification and not only to those who signed an application for membership card in advance of the union's certification – Where individuals are told they will be required to pay more later, the Board is unable to determine if the individuals signed the card because they wanted to join the union or because they wanted to avoid having to make a larger payment – After hearing the evidence of five employees, the Board found each witness to be credible and their evidence to be plausible – The union organizer, who was available, did not testify – Accordingly the Board found that the union organizer had made the alleged statements – The Board found the jurisprudence to be clear: in these situations a cloud is cast over the reliability of the membership evidence – Finally, the Board noted that even though only five employees came forward, the Board was unable to determine the extent to which the employees of the employer were aware of the statements made by the organizer, but inferred that since the organizer collected at least 25% of the cards, the statements were more than likely made to more than five individuals – In these circumstances, given the reliability of the membership evidence was in doubt, the Board found it appropriate to order another representation vote – Application granted; matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE L.I.U.N.A, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE I.U.O.E., LOCAL 793 ..... (May/Jun) 471

Construction Industry – *Charter of Rights and Freedoms* – Judicial Review – Non-Construction Employer The Board concluded ([2009] OLRB Rep. Nov/Dec 826) that the declarations required by s. 127.2 when an employer is found to be a non-construction employer substantially interfered with the process of collective bargaining, contrary to s. 2(d) of the *Charter*, and the infringement could not be saved by s. 1 – On judicial review, the Divisional Court found no such infringement ([2010 OLRB Rep. Jan/Feb 166) – On appeal, the Court of Appeal affirmed that freedom of association is enjoyed by individuals not unions – There was no substantial interference with members' s. 2(d) rights – A s. 127.2 declaration would not make it impossible for the unions' members to meaningfully exercise the freedom to associate – Appeal dismissed

INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059, OLRB AND ATTORNEY GENERAL OF ONTARIO, RE PROVINCIAL BUILDING AND CONSTRUCTION TRADES COUNCIL OF ONTARIO AND GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; OLRB ..... (May/Jun) 553

Construction Industry Grievance – Damages – Jurisdictional Dispute – *Prima Facie* Motion – BACU Local 2 sought damages in a construction industry grievance following a determination in a jurisdictional dispute in which the Board found that Limen had incorrectly assigned work in dispute to BACU Local 31 – PCL had awarded the contract to Limen, who entered into a voluntary recognition agreement with Local 31 to take advantage of the lower wage requirements under that agreement (tile v. brick) – Limen brought a motion to have the grievance dismissed on the grounds that Local 2 had no *prima facie* case for recovering damages – The Board reviewed its case law regarding the awarding of damages arising from an improper assignment of work, affirming such an award should be restricted to instances where the employer's decision was not *bona fide*

or was clearly unreasonable – On this motion, the Board held that it must be satisfied that Local 2 "cannot possibly succeed" in its claim for damages – The Board rejected the view that to allow Limen to go scott-free would signal a "free pass" for employers to enter into new agreements when it suited them; similarly, the Board did not fault Limen for entering into the VRA with Local 31 after having secured the tile work, but before the work actually commenced – Ultimately, the Board was not satisfied that it would *never* find an employer liable to pay damages for contravening a collective agreement by entering into a VRA with a second union, thereby creating the basis for a jurisdictional dispute – Motion dismissed; matter continues

LIMEN GROUP LTD.; RE BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 2 AND INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 2; RE MASONRY INDUSTRY EMPLOYERS' COUNCIL OF ONTARIO/ONTARIO MASONRY CONTRACTORS' ASSOCIATION – BACU BARGAINING COMMITTEE, INTERVENOR NO. 1, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506, INTERVENOR NO. 2, BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 31 AND INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 31, INTERVENOR NO. 3, TERRAZZO, TILE & MARBLE GUILD OF ONTARIO, INC., INTERVENOR NO. 4 ..... (May/Jun) 498

Damages – Construction Industry Grievance – Jurisdictional Dispute – *Prima Facie* Motion – BACU Local 2 sought damages in a construction industry grievance following a determination in a jurisdictional dispute in which the Board found that Limen had incorrectly assigned work in dispute to BACU Local 31 – PCL had awarded the contract to Limen, who entered into a voluntary recognition agreement with Local 31 to take advantage of the lower wage requirements under that agreement (tile v. brick) – Limen brought a motion to have the grievance dismissed on the grounds that Local 2 had no *prima facie* case for recovering damages – The Board reviewed its case law regarding the awarding of damages arising from an improper assignment of work, affirming such an award should be restricted to instances where the employer's decision was not *bona fide* or was clearly unreasonable – On this motion, the Board held that it must be satisfied that Local 2 "cannot possibly succeed" in its claim for damages – The Board rejected the view that to allow Limen to go scott-free would signal a "free pass" for employers to enter into new agreements when it suited them; similarly, the Board did not fault Limen for entering into the VRA with Local 31 after having secured the tile work, but before the work actually commenced – Ultimately, the Board was not satisfied that it would *never* find an employer liable to pay damages for contravening a collective agreement by entering into a VRA with a second union, thereby creating the basis for a jurisdictional dispute – Motion dismissed; matter continues

LIMEN GROUP LTD.; RE BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 2 AND INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 2; RE MASONRY INDUSTRY EMPLOYERS' COUNCIL OF ONTARIO/ONTARIO MASONRY CONTRACTORS' ASSOCIATION – BACU BARGAINING COMMITTEE, INTERVENOR NO. 1, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506, INTERVENOR NO. 2, BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 31 AND INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 31, INTERVENOR NO.

3, TERRAZZO, TILE & MARBLE GUILD OF ONTARIO, INC., INTERVENOR NO. 4 ..... (May/Jun) 498

Delay – Jurisdictional Dispute – Practice and Procedure – AMAPCEO and the Crown asserted that ten applications should be dismissed without inquiring into the merits due to excessive delay on the part of OPSEU in grieving the assignment of work to members of the AMAPCEO bargaining unit – The Board determined a bright line test for delay in work assignment disputes: whether the grieving union has challenged the assignment within 30 days of the initial posting of the position, or of the date that the employer provides the union with notice of the creation of a new position, whichever comes first – The Board then applied this test and declined to inquire into eight of the proceedings on the basis of unreasonable delay, confirming the assignment of this work to AMAPCEO's members – The Board will consider two applications on their merits – Matters continue

ONTARIO PUBLIC SERVICE EMPLOYEES UNION; RE THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF GOVERNMENT SERVICES; RE AMAPCEO ..... (May/Jun) 520

Employer Support – Bar – Certification – Collective Agreement – Constitutional Law – Construction Industry – Timeliness – On the agreed statement of facts there was no dispute that the employer was involved, from time to time, in the installation of new poles, conduit, fibre optic cable, copper cable in new residential subdivisions and this work included the digging and backfilling of trenches, the laying of conduit, the pulling of cable, the replacing and installing of junction boxes and pedestals and bases and the stringing of lines on poles – The Board noted that even if the principal business of the employer is not in the construction industry, if the employer only occasionally or intermittently engages in construction industry work it is enough for the employer to be found to be an employer in the construction industry – The Board found it difficult to conceive the work as being anything other than construction and noted that the attempt to argue the work was maintenance failed since the installation of new telecommunication infrastructure to expand the Bell network can no more be characterized as maintenance than the building of a new highway can be characterized as maintenance to the Province's existing highway system – Fifteen months prior to these applications the employees' Association and the employer renegotiated their collective agreement mid-term and entered into a second one (ratified by the employees) without jointly seeking the Board's consent – The Board reviewed its case law under s. 58(3) noting that the statute explicitly requires that private arrangements to terminate a collective agreement early be monitored and supervised by the Board, which would remove any possibility of other employees or trade unions arguing that the prior arrangements of the parties were inadequate – The Board rejected an argument that the section was somehow discretionary, finding that if a collective agreement shall not be terminated by the parties before it ceases to operate without the consent of the Board, and the Board's consent has not been granted (let alone even been sought), the collective agreement cannot be terminated – Accordingly, the second collective agreement was not a bar to the applications – Finally the Board dealt with the Association's late submissions that the matter was federal (given the work was for Bell) and not within the Board's jurisdiction – For a number of reasons the Board refused to entertain this motion, including that the employer knew the facts underlying the constitutional issue and failed to raise them in a timely fashion and no notice was provided to the Attorneys General pursuant to the Board's Rules or the *Courts of Justice Act* – Alternatively, assuming it was wrong not to entertain the constitutional question, the Board found that the matter was within provincial jurisdiction relying on a number of cases that noted a general construction company whether building an airport or a telephone line has only a "casual" (in the words of the jurisprudence) relationship with its

federal customers which cannot alter the constitutional authority over its regular line of business – Accordingly, if required, the Board found the activities of Expercom to be subject to provincial regulation

EXPERCOM TELECOMMUNICATIONS INC.; RE L.I.U.N.A., LOCAL 24; RE PORT PERRY EMPLOYEES ASSOCIATION ..... (May/Jun) 445

Employer Support – Certification – Intimidation and Coercion – *Prima Facie* Motion – Representation Vote – Unfair Labour Practice – The incumbent union, LIUNA Local 1110, lost a certification vote to HOPE Local 2220 by a significant margin – Local 1110 asked the Board to set aside the vote and dismiss the certification application on the basis that what occurred was so harmful that the true wishes of the employees were not disclosed in the vote – On a motion by Local 2220 to dismiss Local 1110's allegations on a *prima facie* basis the Board reviewed its cases dealing with how it will approach allegations of misconduct in the face of a vote which has already been determined, and found that none of the allegations, individually or collectively, would lead the Board to conclude that the true wishes of the employees (in this large and geographically separated bargaining unit) were not reflected in the results of the representation vote which expressed the choice of the employees by over a three to one margin––Accordingly the motion succeeded – Certificate issued

1367178 ONTARIO INC. CARRYING ON THE BUSINESSES KNOWN AS THE CHARTWELL SENIORS HOUSING REIT LONG TERM RESIDENCES, THE WESTMOUNT, THE WOODHAVEN, THE WYNFIELD AND THE WATERFORD; RE HEALTHCARE, OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 2220; RE UBCJA; RE ONTARIO FEDERATION OF HEALTH CARE WORKERS, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1110 ..... (May/Jun) 429

Employment Standards – The applicants sought review of an order to pay wages issued against them on behalf of a live-in caregiver – The Board took the opportunity to reflect on the provisions of the *Employment Standards Act* and in particular the regulation that entitles an employee to payment for holding himself or herself ready for call to work: when no work has been assigned but an employee is not free to leave the workplace or pursue personal endeavours, that employee is working for purposes of the Act, even in the absence of any productivity or benefit for the employer – The Board found the caregiver in this case was entitled to an even greater amount of wages than calculated by the employment standards officer – Order amended upward; application for review dismissed

TIMOTHY LEYS AND KRISTEN THESBERG; RE AGRIPINA LIKHANGA AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (May/Jun) 540

Grievance Reference – UFCW and Unilever Canada appointed an Arbitrator to hear grievances relating to vacation entitlement under their collective agreement – UFCW, after repeatedly requesting the decision from the Arbitrator, directly and through the Ministry of Labour, without success, requested that the Minister appoint a different arbitrator pursuant to s. 48(4) of the Act – The Minister asked the Board three questions: whether the Arbitrator had lost jurisdiction; whether the Minister had the power under s 48(11) to order that the Arbitrator had lost jurisdiction; and if either answer was "yes" how the parties must proceed – The Board found the first question did not relate to a power of the Minister under the Act, as it was a legal determination that lay within the jurisdiction of the court – On the second question the Board found the Minister's powers under s 48(11) only relate to the Arbitrator the parties have appointed, giving the Minister

power to ensure that a decision is given without undue delay and to address, as appropriate, the Arbitrator's remuneration and expenses – However, the section does not provide the Minister with any power to remove an Arbitrator's jurisdiction (a power that resides with the Superior Court of Justice under the *Judicial Review Procedure Act*) – Advice given

UNILEVER CANADA, A DIVISION OF UNILEVER INC.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175 ..... (May/Jun) 549

Health and Safety – *Occupational Health and Safety Act* – The inspector ordered the School Board to re-inspect a particular school to verify the accuracy of the existing asbestos survey – ETFO appealed the order seeking broader relief relating to all schools in the School Board – The Board followed the jurisprudence which makes it relatively clear that an appeal under s. 61 is not in the nature of an enquiry where all issues are at large, rather the appeal is of a decision or non-decision by the Ministry of Labour – Accordingly the Board found the appeal was restricted to the particular school and the wide relief sought by ETFO for all schools was beyond the jurisdiction of the Board in this appeal – Matter continues

KAWARTHA PINE RIDGE DISTRICT SCHOOL BOARD; RE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; RE HUGH MCGUIRE ..... (May/Jun) 490

Intimidation and Coercion – Certification – Construction Industry – Representation Vote – Unfair Labour Practice – The employer alleged that during an organizing campaign certain union organizers told individuals that if they joined the union now they would have to pay $50 to join, whereas if they joined later it would cost a lot more – The Board noted that there is nothing inappropriate with a trade union having a two-tiered initiation fee structure *provided* the lower initiation fee is made available to all employees of the employer at the time of certification and not only to those who signed an application for membership card in advance of the union's certification – Where individuals are told they will be required to pay more later, the Board is unable to determine if the individuals signed the card because they wanted to join the union or because they wanted to avoid having to make a larger payment – After hearing the evidence of five employees, the Board found each witness to be credible and their evidence to be plausible – The union organizer, who was available, did not testify – Accordingly the Board found that the union organizer had made the alleged statements – The Board found the jurisprudence to be clear: in these situations a cloud is cast over the reliability of the membership evidence – Finally, the Board noted that even though only five employees came forward, the Board was unable to determine the extent to which the employees of the employer were aware of the statements made by the organizer, but inferred that since the organizer collected at least 25% of the cards, the statements were more than likely made to more than five individuals – In these circumstances, given the reliability of the membership evidence was in doubt, the Board found it appropriate to order another representation vote – Application granted; matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE L.I.U.N.A, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE I.U.O.E., LOCAL 793 ..... (May/Jun) 471

Intimidation and Coercion – Certification – Employer Support *Prima Facie* Motion – Representation Vote – Unfair Labour Practice – The incumbent union, LIUNA Local 1110, lost a certification vote to HOPE Local 2220 by a significant margin – Local 1110 asked the Board to set aside the vote and dismiss the certification application on the basis that what occurred was so harmful that the true wishes of the employees were not

disclosed in the vote – On a motion by Local 2220 to dismiss Local 1110's allegations on a *prima facie* basis the Board reviewed its cases dealing with how it will approach allegations of misconduct in the face of a vote which has already been determined, and found that none of the allegations, individually or collectively, would lead the Board to conclude that the true wishes of the employees (in this large and geographically separated bargaining unit) were not reflected in the results of the representation vote which expressed the choice of the employees by over a three to one margin—Accordingly the motion succeeded – Certificate issued

1367178 ONTARIO INC. CARRYING ON THE BUSINESSES KNOWN AS THE CHARTWELL SENIORS HOUSING REIT LONG TERM RESIDENCES, THE WESTMOUNT, THE WOODHAVEN, THE WYNFIELD AND THE WATERFORD; RE HEALTHCARE, OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 2220; RE UBCJA; RE ONTARIO FEDERATION OF HEALTH CARE WORKERS, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1110 ..... (May/Jun) 429

Judicial Review – *Charter of Rights and Freedoms* – Construction Industry – Non-Construction Employer The Board concluded ([2009] OLRB Rep. Nov/Dec 826) that the declarations required by s. 127.2 when an employer is found to be a non-construction employer substantially interfered with the process of collective bargaining, contrary to s. 2(d) of the *Charter*, and the infringement could not be saved by s. 1 – On judicial review, the Divisional Court found no such infringement ([2010 OLRB Rep. Jan/Feb 166) – On appeal, the Court of Appeal affirmed that freedom of association is enjoyed by individuals not unions – There was no substantial interference with members' s. 2(d) rights – A s. 127.2 declaration would not make it impossible for the unions' members to meaningfully exercise the freedom to associate – Appeal dismissed

INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059, OLRB AND ATTORNEY GENERAL OF ONTARIO, RE PROVINCIAL BUILDING AND CONSTRUCTION TRADES COUNCIL OF ONTARIO AND GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; OLRB..... (May/Jun) 553

Jurisdictional Dispute – Construction Industry Grievance – Damages – *Prima Facie* Motion – BACU Local 2 sought damages in a construction industry grievance following a determination in a jurisdictional dispute in which the Board found that Limen had incorrectly assigned work in dispute to BACU Local 31 – PCL had awarded the contract to Limen, who entered into a voluntary recognition agreement with Local 31 to take advantage of the lower wage requirements under that agreement (tile v. brick) – Limen brought a motion to have the grievance dismissed on the grounds that Local 2 had no *prima facie* case for recovering damages – The Board reviewed its case law regarding the awarding of damages arising from an improper assignment of work, affirming such an award should be restricted to instances where the employer's decision was not *bona fide* or was clearly unreasonable – On this motion, the Board held that it must be satisfied that Local 2 "cannot possibly succeed" in its claim for damages – The Board rejected the view that to allow Limen to go scott-free would signal a "free pass" for employers to enter into new agreements when it suited them; similarly, the Board did not fault Limen for entering into the VRA with Local 31 after having secured the tile work, but before the work actually commenced – Ultimately, the Board was not satisfied that it would *never*

find an employer liable to pay damages for contravening a collective agreement by entering into a VRA with a second union, thereby creating the basis for a jurisdictional dispute – Motion dismissed; matter continues

LIMEN GROUP LTD.; RE BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 2 AND INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 2; RE MASONRY INDUSTRY EMPLOYERS' COUNCIL OF ONTARIO/ONTARIO MASONRY CONTRACTORS' ASSOCIATION BACU BARGAINING COMMITTEE, INTERVENOR NO. 1, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506, INTERVENOR NO. 2, BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 31 AND INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 31, INTERVENOR NO. 3, TERRAZZO, TILE & MARBLE GUILD OF ONTARIO, INC., INTERVENOR NO. 4 ..... (May/Jun) 498

Jurisdictional Dispute – Delay – Practice and Procedure – AMAPCEO and the Crown asserted that ten applications should be dismissed without inquiring into the merits due to excessive delay on the part of OPSEU in grieving the assignment of work to members of the AMAPCEO bargaining unit – The Board determined a bright line test for delay in work assignment disputes: whether the grieving union has challenged the assignment within 30 days of the initial posting of the position, or of the date that the employer provides the union with notice of the creation of a new position, whichever comes first – The Board then applied this test and declined to inquire into eight of the proceedings on the basis of unreasonable delay, confirming the assignment of this work to AMAPCEO's members – The Board will consider two applications on their merits – Matters continue

ONTARIO PUBLIC SERVICE EMPLOYEES UNION; RE THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF GOVERNMENT SERVICES; RE AMAPCEO ..... (May/Jun) 520

Non-Construction Employer – *Charter of Rights and Freedoms* – Construction Industry – Judicial Review – The Board concluded ([2009] OLRB Rep. Nov/Dec 826) that the declarations required by s. 127.2 when an employer is found to be a non-construction employer substantially interfered with the process of collective bargaining, contrary to s. 2(d) of the *Charter*, and the infringement could not be saved by s. 1 – On judicial review, the Divisional Court found no such infringement ([2010 OLRB Rep. Jan/Feb 166) – On appeal, the Court of Appeal affirmed that freedom of association is enjoyed by individuals not unions – There was no substantial interference with members' s. 2(d) rights – A s. 127.2 declaration would not make it impossible for the unions' members to meaningfully exercise the freedom to associate – Appeal dismissed

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KAWARTHA PINE RIDGE DISTRICT SCHOOL BOARD; RE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; RE HUGH MCGUIRE ..... (May/Jun) 490

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Prima Facie Motion – Certification – Employer Support – Intimidation and Coercion Representation Vote – Unfair Labour Practice – The incumbent union, LIUNA Local 1110, lost a certification vote to HOPE Local 2220 by a significant margin – Local 1110 asked the Board to set aside the vote and dismiss the certification application on the basis that what occurred was so harmful that the true wishes of the employees were not disclosed in the vote – On a motion by Local 2220 to dismiss Local 1110's allegations on a *prima facie* basis the Board reviewed its cases dealing with how it will approach allegations of misconduct in the face of a vote which has already been determined, and found that none of the allegations, individually or collectively, would lead the Board to conclude that the true wishes of the employees (in this large and geographically separated bargaining unit) were not reflected in the results of the representation vote which expressed the choice of the employees by over a three to one margin—Accordingly the motion succeeded – Certificate issued

1367178 ONTARIO INC. CARRYING ON THE BUSINESSES KNOWN AS THE CHARTWELL SENIORS HOUSING REIT LONG TERM RESIDENCES, THE WESTMOUNT, THE WOODHAVEN, THE WYNFIELD AND THE WATERFORD; RE HEALTHCARE, OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 2220; RE UBCJA; RE ONTARIO FEDERATION OF HEALTH CARE WORKERS, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1110 ..... (May/Jun) 429

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Reference Grievance – UFCW and Unilever Canada appointed an Arbitrator to hear grievances relating to vacation entitlement under their collective agreement – UFCW, after repeatedly requesting the decision from the Arbitrator, directly and through the Ministry of Labour, without success, requested that the Minister appoint a different arbitrator pursuant to s. 48(4) of the Act – The Minister asked the Board three questions: whether the Arbitrator had lost jurisdiction; whether the Minister had the power under s 48(11) to order that the Arbitrator had lost jurisdiction; and if either answer was "yes" how the parties must proceed – The Board found the first question did not relate to a power of the Minister under the Act, as it was a legal determination that lay within the jurisdiction of the court – On the second question the Board found the Minister's powers under s 48(11) only relate to the Arbitrator the parties have appointed, giving the Minister power to ensure that a decision is given without undue delay and to address, as appropriate, the Arbitrator's remuneration and expenses – However, the section does not provide the Minister with any power to remove an Arbitrator's jurisdiction (a power that resides with the Superior Court of Justice under the *Judicial Review Procedure Act*) – Advice given

UNILEVER CANADA, A DIVISION OF UNILEVER INC.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175 ..... (May/Jun) 549

Representation Vote – Certification – Construction Industry – Intimidation and Coercion – Unfair Labour Practice – The employer alleged that during an organizing campaign certain union organizers told individuals that if they joined the union now they would

have to pay $50 to join, whereas if they joined later it would cost a lot more – The Board noted that there is nothing inappropriate with a trade union having a two-tiered initiation fee structure *provided* the lower initiation fee is made available to all employees of the employer at the time of certification and not only to those who signed an application for membership card in advance of the union's certification – Where individuals are told they will be required to pay more later, the Board is unable to determine if the individuals signed the card because they wanted to join the union or because they wanted to avoid having to make a larger payment – After hearing the evidence of five employees, the Board found each witness to be credible and their evidence to be plausible – The union organizer, who was available, did not testify – Accordingly the Board found that the union organizer had made the alleged statements – The Board found the jurisprudence to be clear: in these situations a cloud is cast over the reliability of the membership evidence – Finally, the Board noted that even though only five employees came forward, the Board was unable to determine the extent to which the employees of the employer were aware of the statements made by the organizer, but inferred that since the organizer collected at least 25% of the cards, the statements were more than likely made to more than five individuals – In these circumstances, given the reliability of the membership evidence was in doubt, the Board found it appropriate to order another representation vote – Application granted; matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE L.I.U.N.A, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE I.U.O.E., LOCAL 793 ..... (May/Jun) 471

Representation Vote – Certification – Employer Support – Intimidation and Coercion – *Prima Facie* Motion – Unfair Labour Practice – The incumbent union, LIUNA Local 1110, lost a certification vote to HOPE Local 2220 by a significant margin – Local 1110 asked the Board to set aside the vote and dismiss the certification application on the basis that what occurred was so harmful that the true wishes of the employees were not disclosed in the vote – On a motion by Local 2220 to dismiss Local 1110's allegations on a *prima facie* basis the Board reviewed its cases dealing with how it will approach allegations of misconduct in the face of a vote which has already been determined, and found that none of the allegations, individually or collectively, would lead the Board to conclude that the true wishes of the employees (in this large and geographically separated bargaining unit) were not reflected in the results of the representation vote which expressed the choice of the employees by over a three to one margin—Accordingly the motion succeeded – Certificate issued

1367178 ONTARIO INC. CARRYING ON THE BUSINESSES KNOWN AS THE CHARTWELL SENIORS HOUSING REIT LONG TERM RESIDENCES, THE WESTMOUNT, THE WOODHAVEN, THE WYNFIELD AND THE WATERFORD; RE HEALTHCARE, OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 2220; RE UBCJA; RE ONTARIO FEDERATION OF HEALTH CARE WORKERS, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1110 .... (May/Jun) 429

Timeliness – Bar – Certification – Collective Agreement – Constitutional Law – Construction Industry – Employer Support – On the agreed statement of facts there was no dispute that the employer was involved, from time to time, in the installation of new poles, conduit, fibre optic cable, copper cable in new residential subdivisions and this work included the digging and backfilling of trenches, the laying of conduit, the pulling of cable, the replacing and installing of junction boxes and pedestals and bases and the stringing of lines on poles – The Board noted that even if the principal business of the employer is not in the construction industry, if the employer only occasionally or intermittently engages

in construction industry work it is enough for the employer to be found to be an employer in the construction industry – The Board found it difficult to conceive the work as being anything other than construction and noted that the attempt to argue the work was maintenance failed since the installation of new telecommunication infrastructure to expand the Bell network can no more be characterized as maintenance than the building of a new highway can be characterized as maintenance to the Province's existing highway system – Fifteen months prior to these applications the employees' Association and the employer renegotiated their collective agreement mid-term and entered into a second one (ratified by the employees) without jointly seeking the Board's consent – The Board reviewed its case law under s. 58(3) noting that the statute explicitly requires that private arrangements to terminate a collective agreement early be monitored and supervised by the Board, which would remove any possibility of other employees or trade unions arguing that the prior arrangements of the parties were inadequate – The Board rejected an argument that the section was somehow discretionary, finding that if a collective agreement shall not be terminated by the parties before it ceases to operate without the consent of the Board, and the Board's consent has not been granted (let alone even been sought), the collective agreement cannot be terminated – Accordingly, the second collective agreement was not a bar to the applications – Finally the Board dealt with the Association's late submissions that the matter was federal (given the work was for Bell) and not within the Board's jurisdiction – For a number of reasons the Board refused to entertain this motion, including that the employer knew the facts underlying the constitutional issue and failed to raise them in a timely fashion and no notice was provided to the Attorneys General pursuant to the Board's Rules or the *Courts of Justice Act* – Alternatively, assuming it was wrong not to entertain the constitutional question, the Board found that the matter was within provincial jurisdiction relying on a number of cases that noted a general construction company whether building an airport or a telephone line has only a "casual" (in the words of the jurisprudence) relationship with its federal customers which cannot alter the constitutional authority over its regular line of business – Accordingly, if required, the Board found the activities of Expercom to be subject to provincial regulation

EXPERCOM TELECOMMUNICATIONS INC.; RE L.I.U.N.A., LOCAL 24; RE PORT PERRY EMPLOYEES ASSOCIATION..... (May/Jun) 445

Unfair Labour Practice – Certification – Construction Industry – Intimidation and Coercion – Representation Vote – The employer alleged that during an organizing campaign certain union organizers told individuals that if they joined the union now they would have to pay $50 to join, whereas if they joined later it would cost a lot more – The Board noted that there is nothing inappropriate with a trade union having a two-tiered initiation fee structure *provided* the lower initiation fee is made available to all employees of the employer at the time of certification and not only to those who signed an application for membership card in advance of the union's certification – Where individuals are told they will be required to pay more later, the Board is unable to determine if the individuals signed the card because they wanted to join the union or because they wanted to avoid having to make a larger payment – After hearing the evidence of five employees, the Board found each witness to be credible and their evidence to be plausible – The union organizer, who was available, did not testify – Accordingly the Board found that the union organizer had made the alleged statements – The Board found the jurisprudence to be clear: in these situations a cloud is cast over the reliability of the membership evidence – Finally, the Board noted that even though only five employees came forward, the Board was unable to determine the extent to which the employees of the employer were aware of the statements made by the organizer, but inferred that since the organizer collected at least 25% of the cards, the statements were more than likely made to more

than five individuals – In these circumstances, given the reliability of the membership evidence was in doubt, the Board found it appropriate to order another representation vote – Application granted; matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE L.I.U.N.A, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE I.U.O.E., LOCAL 793 ..... (May/Jun) 471

Unfair Labour Practice – Certification – Employer Support – Intimidation and Coercion – *Prima Facie* Motion – Representation Vote – The incumbent union, LIUNA Local 1110, lost a certification vote to HOPE Local 2220 by a significant margin – Local 1110 asked the Board to set aside the vote and dismiss the certification application on the basis that what occurred was so harmful that the true wishes of the employees were not disclosed in the vote – On a motion by Local 2220 to dismiss Local 1110's allegations on a *prima facie* basis the Board reviewed its cases dealing with how it will approach allegations of misconduct in the face of a vote which has already been determined, and found that none of the allegations, individually or collectively, would lead the Board to conclude that the true wishes of the employees (in this large and geographically separated bargaining unit) were not reflected in the results of the representation vote which expressed the choice of the employees by over a three to one margin—Accordingly the motion succeeded – Certificate issued

1367178 ONTARIO INC. CARRYING ON THE BUSINESSES KNOWN AS THE CHARTWELL SENIORS HOUSING REIT LONG TERM RESIDENCES, THE WESTMOUNT, THE WOODHAVEN, THE WYNFIELD AND THE WATERFORD; RE HEALTHCARE, OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 2220; RE UBCJA; RE ONTARIO FEDERATION OF HEALTH CARE WORKERS, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1110 ..... (May/Jun) 429

Bargaining Rights – Bargaining Unit – *Public Sector Labour Relations Transition Act* – Previously the Board had determined that the creation of clinics in Sarnia and Chatham-Kent for ambulatory clients constituted a "health services integration" under *PSLRTA* and declared that PSLRTA applied – Nursing services to these ambulatory clients were previously provided on a home care basis by VON-Sarnia and VON-Chatham-Kent, for whom ONA held bargaining rights - Bayshore, a non-union employer, was the successful bidder to provide services to ambulatory clients through the clinics – The issue now before the Board under s. 22 of *PSLRTA* was the bargaining unit appropriate to Bayshore's operations after the health services integration having regard to the purposes of PSLRTA– Bayshore took the position that a bargaining unit restricted to the transferred service was appropriate, i.e. full-time RNs at the Clinics – ONA adopted the facts stated by Bayshore in response to a subsequent application for certification by another union, and argued that a bargaining unit of all RNs and all RPNs was appropriate to Bayshore's operations, given the high degree of integration of their work, terms and conditions of employment and supervision – The Board first noted that s. 22 does not confer bargaining rights upon a bargaining agent; rather section 23 requires a vote and where 40% or more of the bargaining unit were not represented by a bargaining agent, as was the instant case, "no union" had to be an option on the ballot – Whether or not ONA's bargaining rights with respect to the transferred services were preserved was incidental to the determination of what bargaining unit was appropriate for Bayshore's operations – Based on the facts stated by Bayshore in the other application, and not disavowed by Bayshore in this application, the Board found that a bargaining unit of all RNs and RPNs was appropriate to Bayshore's operations – Consideration of the four purposes of *PSLRTA* did not change this result, given the degree of integration of RNs

and RPNs in Bayshore's operations: 1) a bargaining unit of all RNs and RPNs is more likely to "encourage best practices that ensure delivery of quality and effective public services that are affordable for taxpayers" 2) there were no other bargaining units to be rationalized and the bargaining unit consisting of RNs and RPNs would result in effective collective bargaining structures; 3) either bargaining unit will come into effect only if a majority of the employees in the bargaining unit vote that they wish to be represented by ONA, however, only the bargaining unit consisting of all RNs and all RPNs would facilitate collective bargaining and 4) although integrating RNs and RPNs may reduce workplace disputes in the future, permitting the expansion of bargaining rights, absent agreement of the parties may not – The Board found however that this last concern gave way to all the other factors and determined the bargaining unit appropriate for Bayshore encompasses all RNs and RPNs – Matter continues

BAYSHORE HOME HEALTH; RE ONTARIO NURSES' ASSOCIATION; RE BAYSHORE HOME HEALTH, SARNIA; RE BAYSHORE HOME HEALTH, CHATHAM; RE VICTORIAN ORDER OF NURSES SARNIA-LAMBTON; RE VICTORIAN ORDER OF NURSES CHATHAM-KENT; RE ERIE ST. CLAIR COMMUNITY CARE ACCESS CENTRE .....(Jul/Aug) 584

Bargaining Rights – Jurisdictional Dispute – Conciliation – Reference – Voluntary Recognition – The Minister of Labour asked the Board whether she has the authority to appoint a conciliation officer in this matter, involving a bargaining unit of employees who work at various Dilico Anishinabek Family Care ("Dilico") centres The Union obtained bargaining rights from the Canada Industrial Relations Board ("CIRB") Dilico participated in the CIRB proceedings but always objected to CIRB jurisdiction over its labour relations – The Union issued notice to bargain a second renewal of the collective agreement, followed by a request to the Ontario Ministry of Labour for the appointment of a Conciliation Officer, both of which were objected to by Dilico – Dilico argued that it had never voluntarily recognized the union, that the union was never certified by the Board, and that Dilico had only engaged in bargaining because the Union had previously obtained those rights from the CIRB – The Union argued that Dilico's voluntary recognition for the Union was a product of the first collective agreement and was confirmed by the execution of the second collective agreement – Assuming, without deciding, that the Board has jurisdiction over the labour relations of Dilico, the Board stated that the voluntary recognition provision provides an alternative route to the normal certification procedures and that the language of the statute contemplates intention – Dilico's lack of intention was manifest throughout and their participation in the CIRB proceedings should not be seen as voluntary – Additionally, the Union was never certified by the Board – Accordingly, the Union had no legal right to serve an enforceable notice to bargain, which is a prerequisite to the appointment of a conciliation office by the Minister – The question referred to the Board is answered in the negative

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL 7-0-1; RE DILICO ANISHINABEK FAMILY CARE .....(Jul/Aug) 596

Bargaining Unit – Bargaining Rights – *Public Sector Labour Relations Transition Act* – Previously the Board had determined that the creation of clinics in Sarnia and Chatham-Kent for ambulatory clients constituted a "health services integration" under *PSLRTA* and declared that PSLRTA applied – Nursing services to these ambulatory clients were previously provided on a home care basis by VON-Sarnia and VON-Chatham-Kent, for whom ONA held bargaining rights - Bayshore, a non-union employer, was the successful bidder to provide services to ambulatory clients through the clinics – The issue now before the Board under s 22 of *PSLRTA* was the bargaining unit appropriate to

Bayshore's operations after the health services integration having regard to the purposes of PSLRTA– Bayshore took the position that a bargaining unit restricted to the transferred service was appropriate, i.e. full-time RNs at the Clinics – ONA adopted the facts stated by Bayshore in response to a subsequent application for certification by another union, and argued that a bargaining unit of all RNs and all RPNs was appropriate to Bayshore's operations, given the high degree of integration of their work, terms and conditions of employment and supervision – The Board first noted that s. 22 does not confer bargaining rights upon a bargaining agent; rather section 23 requires a vote and where 40% or more of the bargaining unit were not represented by a bargaining agent, as was the instant case, "no union" had to be an option on the ballot – Whether or not ONA's bargaining rights with respect to the transferred services were preserved was incidental to the determination of what bargaining unit was appropriate for Bayshore's operations – Based on the facts stated by Bayshore in the other application, and not disavowed by Bayshore in this application, the Board found that a bargaining unit of all RNs and RPNs was appropriate to Bayshore's operations – Consideration of the four purposes of *PSLRTA* did not change this result, given the degree of integration of RNs and RPNs in Bayshore's operations: 1) a bargaining unit of all RNs and RPNs is more likely to "encourage best practices that ensure delivery of quality and effective public services that are affordable for taxpayers" 2) there were no other bargaining units to be rationalized and the bargaining unit consisting of RNs and RPNs would result in effective collective bargaining structures; 3) either bargaining unit will come into effect only if a majority of the employees in the bargaining unit vote that they wish to be represented by ONA, however, only the bargaining unit consisting of all RNs and all RPNs would facilitate collective bargaining and 4) although integrating RNs and RPNs may reduce workplace disputes in the future, permitting the expansion of bargaining rights, absent agreement of the parties may not – The Board found however that this last concern gave way to all the other factors and determined the bargaining unit appropriate for Bayshore encompasses all RNs and RPNs – Matter continues

BAYSHORE HOME HEALTH; RE ONTARIO NURSES' ASSOCIATION; RE BAYSHORE HOME HEALTH, SARNIA; RE BAYSHORE HOME HEALTH, CHATHAM; RE VICTORIAN ORDER OF NURSES SARNIA-LAMBTON; RE VICTORIAN ORDER OF NURSES CHATHAM-KENT; RE ERIE ST. CLAIR COMMUNITY CARE ACCESS CENTRE .....(Jul/Aug) 584

Build-Up – Certification – Fraud – Intervenor – Reconsideration – Termination – Unfair Labour Practice – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending

that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 .....(Jul/Aug) 747

Certification – Build-Up – Fraud – Intervenor – Reconsideration – Termination – Unfair Labour Practice – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues.

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 .....(Jul/Aug) 747

Certification Interim Relief – Practice and Procedure – Unfair Labour Practice – The Labourers sought interim reinstatement of K – As the employer conceded there was a serious issue to be tried and the circumstance occurred during an organizing campaign, the remaining issues were irreparable harm and balance of harm, and whether the termination of K was unrelated to the exercise of rights under the Act – Procedurally, the Board struck a reply declaration as it did not comply with Rule 19.3 (it was neither in response to a new issue which the applicant had no opportunity to address nor did it address issues the applicant could not have reasonably anticipated) – On the merits, the Board accepted the information in the ten declarations by the employer that no employee had asked about K's termination, nor had any employee indicated any understanding or belief that the end of K's employment with the Company was in any way connected to his support for the union organizing campaign – Additionally, the Board noted the timing of a number of events (including K's termination occurring 1 ½ months after the union

represented to the employer and the Board that the campaign was dead) did not favour an inference that the employer knew K was a union organizer – The Board found nothing pleaded by the applicants that K's termination had caused irreparable harm or a "chilling effect" on the workplace – Accordingly, the interim application was dismissed

JAMES DICK CONSTRUCTION LIMITED, JAMES DICK HOLDINGS LIMITED, CALEDON SAND & GRAVEL INC., HAMILTON READY MIX LTD., ASSINCK LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506 .....(Jul/Aug) 708

Certification – Parties – Reconsideration – *State Immunity Act* – The Board previously granted DCMA's request to reconsider its decision certifying PSAC and directed a hearing to hear the evidence with respect to DCMA's claim for sovereign immunity under the *State Immunity Act* – The two issues were whether: 1) DCMA submitted (or attorned) to the jurisdiction of the OLRB as specifically contemplated by s. 4 of the *SIA*; and 2) the "commercial activity" exception to immunity applied, as specifically contemplated by s. 5 of the *SIA* – On the first issue the Board noted that an entity entitled to immunity that unknowingly takes a step in a proceeding can only escape having attorned to the authority of the court if the facts "could not reasonably have been ascertained" – The Board found the following occurred: PSAC served the certification application on the Commander, who was an individual who had authority to enter into agreements; the Commander consulted with DCMA's own counsel in Virginia; a Response was filed which raised substantive issues, explicitly acknowledged it was an agency of the US Department of Defence, it agreed to a vote and where it would be conducted, proposed individuals as scrutineers and filed schedules of employees; it participated in the vote and sought to add its counsel to the list of people being contacted; participated by teleconference in the counting of the ballots; and participated in further discussions – Only several days later, in post vote representations does the DCMA raise the issue of sovereign immunity – Given all this involvement by the DCMA, the Board was not prepared to accept that these actions were taken without the knowledge of the rights being waived – Having found that DCMA waived immunity, the Board went on to determine the "commercial activity" exception – The Board noted that the DCMA is "responsible in ensuring the integrity of contractual processes providing a broad range of contract procurement management services," and although it is weapons that are being purchased, the DCMA neither negotiates nor awards the contracts, but just monitors the implementation of the contracts – The Board was not convinced that sovereign activity was "insuring that you get what you bought, on time and for the negotiated price – which is what DCMA does" – The Board found that the connection was not too tenuous to create the requisite nexus for commercial activity to be brought into play, particularly when to hold otherwise would be to deprive Canadian workers, working on Canadian soil, the benefits of Canadian law; when American employees of DCMA are already represented in collective bargaining by a trade union and when the Commander in testimony acknowledged he could manage if the employees were engaged in collective bargaining – Accordingly the Board concluded that if DCMA has not waived its state immunity and attorned to the jurisdiction of the Board, then it is not immune pursuant to s. 5 of the *SIA* because these proceedings related to a commercial activity – Interim Certificate issued

DEFENSE CONTRACT MANAGEMENT AGENCY – AMERICAS (CANADA); RE PUBLIC SERVICE ALLIANCE OF CANADA .....(Jul/Aug) 603

Collective Agreement – Construction Industry Grievance – The Union filed grievances claiming that the employer had violated the collective agreement by failing to transfer two grievors closer to their regular residences – The issue before the Board was the interpretation of

Article 802 C of the collective agreement which states that 'The Employer will make every reasonable effort to transfer employees as near as possible to their regular residences as work permits' – The Union argued that there was plenty of work available in the requested zone and that the employer failed to make 'every reasonable effort' to transfer W and A closer to their respective regular residences – The employer argued that the words 'as work permits' means that the employer only has to make every reasonable effort if there is a lack of work in the zone the employee is transferring from and there is work available in the requested zone – The employer submitted that at the time of the request, they had lost experienced workers and could not afford to transfer out any workers – The Board held that Article 802 C of the collective agreement includes not only an assessment by the employer of available work in the requested zone, but also the amount of work in the zone from which the transfer would be made – The Board dismissed A's grievance on the basis that a verbal request for a transfer is insufficient to engage Article 802 C – The Board dismissed W's grievance on the basis that it was not possible for the employer to accommodate a transfer as it had very recently experienced the loss of a number of journeyman electricians in the zone from which A wished to transfer – Grievances dismissed

HYDRO ONE NETWORKS INC.; RE CANADIAN UNION OF SKILLED WORKERS ..... (Jul/Aug) 697

Collective Agreement – First Contract Arbitration – Following a direction from the Board for the settlement of a first collective agreement by arbitration, the parties returned to the Board to have their differences adjudicated – The only outstanding issues for resolution were wage rates and the number of hours required to qualify for benefits coverage –The Board accepted the union's submissions that the Board's role was to effect an agreement that was "fair and reasonable" and would be "comparable to others in the same industry and geographic area," applying an objective standard – The employer, having terminated a contract with a predecessor cleaner company, attempted to introduce reduced wage rates and a higher threshold (minimum hours) of eligibility for benefits coverage – The Board specifically rejected the employer's argument that "ability to pay" should be a consideration – The Board found that the union's proposals reflected the terms of the collective agreement with the predecessor cleaner company when the contract was terminated – Those terms could hardly be described as "breakthrough" – Collective agreement ordered

KLEENWAY BUILDING MAINTENANCE SERVICES INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059 .....(Jul/Aug) 725

Conciliation – Jurisdictional Dispute – Bargaining Rights – Reference – Voluntary Recognition – The Minister of Labour asked the Board whether she has the authority to appoint a conciliation officer in this matter, involving a bargaining unit of employees who work at various Dilico Anishinabek Family Care ("Dilico") centres The Union obtained bargaining rights from the Canada Industrial Relations Board ("CIRB") – Dilico participated in the CIRB proceedings but always objected to CIRB jurisdiction over its labour relations – The Union issued notice to bargain a second renewal of the collective agreement, followed by a request to the Ontario Ministry of Labour for the appointment of a Conciliation Officer, both of which were objected to by Dilico – Dilico argued that it had never voluntarily recognized the union, that the union was never certified by the Board, and that Dilico had only engaged in bargaining because the Union had previously obtained those rights from the CIRB – The Union argued that Dilico's voluntary recognition for the Union was a product of the first collective agreement and was confirmed by the execution of the second collective agreement – Assuming, without

deciding, that the Board has jurisdiction over the labour relations of Dilico, the Board stated that the voluntary recognition provision provides an alternative route to the normal certification procedures and that the language of the statute contemplates intention – Dilico's lack of intention was manifest throughout and their participation in the CIRB proceedings should not be seen as voluntary – Additionally, the Union was never certified by the Board – Accordingly, the Union had no legal right to serve an enforceable notice to bargain, which is a prerequisite to the appointment of a conciliation office by the Minister – The question referred to the Board is answered in the negative

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL 7-0-1; RE DILICO ANISHINABEK FAMILY CARE .....(Jul/Aug) 596

Construction Industry Grievance – Collective Agreement – The Union filed grievances claiming that the employer had violated the collective agreement by failing to transfer two grievors closer to their regular residences – The issue before the Board was the interpretation of Article 802 C of the collective agreement which states that 'The Employer will make every reasonable effort to transfer employees as near as possible to their regular residences as work permits' – The Union argued that there was plenty of work available in the requested zone and that the employer failed to make 'every reasonable effort' to transfer W and A closer to their respective regular residences – The employer argued that the words 'as work permits' means that the employer only has to make every reasonable effort if there is a lack of work in the zone the employee is transferring from and there is work available in the requested zone – The employer submitted that at the time of the request, they had lost experienced workers and could not afford to transfer out any workers – The Board held that Article 802 C of the collective agreement includes not only an assessment by the employer of available work in the requested zone, but also the amount of work in the zone from which the transfer would be made – The Board dismissed A's grievance on the basis that a verbal request for a transfer is insufficient to engage Article 802 C – The Board dismissed W's grievance on the basis that it was not possible for the employer to accommodate a transfer as it had very recently experienced the loss of a number of journeyman electricians in the zone from which A wished to transfer – Grievances dismissed

HYDRO ONE NETWORKS INC.; RE CANADIAN UNION OF SKILLED WORKERS ..... (Jul/Aug) 697

Construction Industry Grievance – CUSW sought payment for travel time for some of its employees when Hydro One provided transportation for the employees but required one of them to drive the vehicle from the worksite to the agreed-upon assembly point – The Board found no ambiguity in the language of the collective agreement: Hydro One's provision of "transportation" in the form of a vehicle parked for the employees' use, with no one to operate it, meant that one of the employees had to effectively be employed as a driver – Grievance allowed

HYDRO ONE INC.; RE CANADIAN UNION OF SKILLED WORKERS ..... (Jul/Aug) 688

Construction Industry Grievance – Judicial Review – Timeliness – The Board had originally held that it had the discretion to accept a grievance referral under s. 133 of the Act, notwithstanding the language in the collective agreement that deemed a grievance filed beyond 14 days to be settled – On judicial review, applying a standard of reasonableness, the Divisional Court quashed the Board's determination: [2011] OLRB Rep September/October 629 – On appeal, the Court of Appeal upheld the Divisional Court

ruling: the Board had to apply the terms of the collective agreement which deemed the grievance settled if it was not referred to arbitration within 14 days — The Court said the Board did not have the right to ignore the express terms of the collective agreement that addressed the grievance and arbitration procedures – Appeal dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE ONTARIO LABOUR RELATIONS BOARD.....(Jul/Aug) 756

Construction industry Grievance – Jurisdictional Dispute Practice and Procedure – Reconsideration – The Labourers sought reconsideration of a Board decision deferring the adjudication of a grievance pending the outcome of a jurisdictional dispute, arguing that the grievance relating to the sub-contracted work was insufficient to trigger a jurisdictional dispute, or insufficient to allow the jurisdictional dispute to take primacy over the grievance referral and cause it to be deferred – The Board held that its longstanding jurisprudence clearly suggests that a multi-party dispute is much more efficiently and effectively addressed through the jurisdictional dispute process – The Labourers will not be deprived of their collective agreement argument when the underlying issue of the jurisdictional dispute is heard – Reconsideration denied; briefs ordered

DINEEN CONSTRUCTION LIMITED; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 46; RE MONALT ENVIRONMENTAL INC. .....(Jul/Aug) 626

Duty of Fair Representation – Remedies – Among other complaints the applicant alleged that her union failed to advise employees as part of the ratification process that the employer had given notice during collective bargaining of its intention to revert to the strict language of the collective agreement with respect to an article in the collective agreement addressing entitlement to work at home – The article required employees to request prior approval, although the employer had been allowing employees, such as the complainant, to work from home for some time without seeking prior approval – The employer did advise the union that it intended to strictly enforce the work at home article, however during the course of two ratification procedures the union did not advise the employees of the notice given by the employer – The Board found that this was not a case of an inadvertent mistake having been made in the material circulated during the ratification process, but rather a case of a complete absence of communication regarding the elimination of a term or condition of employment during a critically important part of the collective bargaining process – The Board found the failure of the union to advise employees that the employer was going to eliminate a term and condition of employment that they had enjoyed for a number of years reflected a complete disregard for the critical consequences to employees and undermined the statutory purpose of requiring ratification votes, and accordingly the failure was arbitrary and a breach of s. 74 – Concerning remedy the Board found that the complainant lost the opportunity to discuss the matter with fellow employees, which may or may not have gotten the issue back to the bargaining table and may or may not have resulted in some change – The Board advised the parties that it saw this as a mere loss of opportunity which will only attract nominal damages and remained seized to address damages if the parties could not agree on the quantum – Declaration made; Application granted in part

GAIL MYLES; RE ALLIANCE EMPLOYEES UNION (AEU); RE UNION OF NATIONAL EMPLOYEES .....(Jul/Aug) 633

Employment Standards – Practice and Procedure – The employer sought leave of the Board to dispense with service of its application on several hundred employees, and permission to make payment of the substantial order in instalments beyond the 30-day limit for filing the appeal – In the circumstances of this case, the Board relieved the employer of the obligation to serve each employee individually, requiring the employer to post its application and the Board's decision in the workplace (subject to personal delivery to employees no longer part of the employer's workforce) – With respect to the payment of the order into trust, the Board affirmed that historically it has not exercised its discretion to extend the time for filing until the full payment has been made – The Board stated, however, that if the employer paid the full amount of the order in accordance with its proposed schedule, it is likely that the Board will exercise its discretion to extend the time for filing to the date of the final payment – Matter proceeds

450477 ONTARIO LIMITED OPERATING AS CHARTRAND EQUIPMENT; RE JEAN-LOUISE ALBERT, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS .....(Jul/Aug) 577

Employment Standards The employer appealed an Employment Standards Officer's Compliance Orders for public holiday pay and an order to pay employees at the prescribed minimum wage – The issue was whether servers who served alcohol infrequently at a licensed restaurant should be paid the standard minimum wage of $10.25 or the liquor server minimum wage of $8.90 per hour set out in s. 5(1) of Ontario Regulation 285/01 – The lower wage rate applies to an employee who serves liquor "as a *regular* part of his or her employment" – The Director of Employment Standards (DES) argued that an interpretation of the word *regular* should include the context of the employer's business: if the sale of liquor is an insignificant part of the business, then the liquor server minimum wage should not apply – The employer countered that the liquor service is a regular part of the servers' employment as the restaurant is licensed and its employees are required to serve alcohol upon request – The Board rejected DES' argument and determined that the volume of liquor sales is irrelevant – The central question for the Board was whether the serving of alcohol was a regular part of the servers' employment – The evidence was that alcohol sales, though low, occurred almost every day – The application was allowed and the Compliance Orders rescinded – The Board ordered DES to return the money paid into trust, including the administrative fee, to the Employer

1180240 ONTARIO INC. O/A JOEY'S ONLY SEAFOOD; RE PENNY WILKS, WILLOW WALKER, ALINE HEIMBUCH, ALICJA DWOZAK, LIA CARRIER, ALLISHA PEEVER, SAMANTHA QUILTY, DENRA SLIPP, ALISSA CROSSLEY, ROSELLE NOORDYK, TRACIE BOONE, KENDRA DEARLOVE, DEANNA WINN; RE DIRECTOR OF EMPLOYMENT STANDARDS .....(Jul/Aug) 573

Employment Standards – The employer, which provides manure transporting and spreading services to farms, took the position that it was exempt from the overtime and maximum hours provisions in the Act, in that it met the requirements prescribed in s. 2(2) of O Reg 285/01 which exempts farmers from those sections – The Board noted that in order to meet the requirements of the Regulation the employer's employees must be "employed on a farm" and their employment must be "directly related to the primary production" of one or more of a number of farming categories – Although noting that the employees did not have a direct employment relationship with the farmer, the Board did not decide

whether the employees were employed on a farm, given its conclusion that the employer was not involved in the primary production of farming – The Board found that Organix's work did not involve direct contact with any of the agricultural products listed in the regulation; it did not seed, tend, grow or harvest an agricultural product; and it collected and moved manure and prepared soil so that others may engage in the primary production of agricultural products – The Board found Organix's work to be ancillary to the primary production of farm produce – Compliance order confirmed

ORGANIX MATTERS INC.; RE DIRECTOR OF EMPLOYMENT STANDARDS .....
.....(Jul/Aug) 735

First Contract Arbitration – Collective Agreement – Following a direction from the Board for the settlement of a first collective agreement by arbitration, the parties returned to the Board to have their differences adjudicated – The only outstanding issues for resolution were wage rates and the number of hours required to qualify for benefits coverage –The Board accepted the union's submissions that the Board's role was to effect an agreement that was "fair and reasonable" and would be "comparable to others in the same industry and geographic area," applying an objective standard – The employer, having terminated a contract with a predecessor cleaner company, attempted to introduce reduced wage rates and a higher threshold (minimum hours) of eligibility for benefits coverage – The Board specifically rejected the employer's argument that "ability to pay" should be a consideration – The Board found that the union's proposals reflected the terms of the collective agreement with the predecessor cleaner company when the contract was terminated – Those terms could hardly be described as "breakthrough" – Collective agreement ordered

KLEENWAY BUILDING MAINTENANCE SERVICES INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059 .....(Jul/Aug) 725

Fraud – Build-Up – Certification – Intervenor – Reconsideration – Termination – Unfair Labour Practice – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues.

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 .....(Jul/Aug) 747

Health and Safety – The employer sought suspension of an inspector's order that personal protective equipment be provided for employees of a sleep clinic, many of whose patients suffered from a contagious respiratory condition – The employer relied on documentation relating to cleaning and disinfection but did not explain how that protocol related to the employer's policies or procedures; further, the employer relied on a second document, a peer review assessment, that was four-and-a-half years old and made no mention of the current employer – The Ministry's submissions asserted that the employer had no screening procedures, no infection control measures, nor any personal protective equipment that would deal with potential exposure to the air-borne infection – The Board found that the health and safety of the workers might be endangered if the order were suspended, and the employer was unable to show that it would be prejudiced if the order were not suspended – Suspension request denied

ACCQCORP; RE JENNIFER MATTHIE, MARILYNNE MCDONALD AND MELANIE WEGLER, INSPECTORS .....(Jul/Aug) 579

Interim Order – Jurisdictional Dispute – The Carpenters sought an interim order in the context of a jurisdictional dispute over the assignment of certain carpentry trim work in the high-rise residential sector that was being performed by the Labourers – The Labourers, in a collective bargaining relationship with Provincial Carpentry, had been doing the trim work for approximately nine months when they were told they were being removed from the project and replaced by members of the Carpenters with a bargaining relationship with Dole Contracting – After one day of an informational picket established by the Labourers in protest of the re-assignment, the work was returned to Provincial and the Labourers – The Carpenters filed the jurisdictional dispute and sought to be placed on the project pending the outcome of the application – The Carpenters argued that the Labourers had engaged in illegal conduct by setting up the picket line and they should not be rewarded for these unlawful self-help efforts – The Labourers, for their part, denied any illegal conduct and argued that the Carpenters had not objected to the work assignment for nine months, and had not filed a grievance—in fact, could not do so—because they had no bargaining relationship with Provincial; it was only when the work was taken away from the Labourers and given to the Carpenters (and Dole) that the Carpenters were able to assert any rights over the work – The Board found that the Labourers, instead of waiting for the adjudication of its grievance or seeking a resolution to the jurisdictional dispute, intended to and did cause a work stoppage to protest the re-assignment of the work to the Carpenters: the conduct was improper and was not to be condoned – However, in the particular circumstances of this case, where it was not clear why Dole was awarded the work, and why it was being transferred to another contractor with a collective agreement with a different union, after nine months of uninterrupted (and unprotested) work by the Labourers working for Professional, and where a Carpenter win in the jurisdictional dispute would garner it a declaration only (the Board would not direct that the work be assigned to a particular contractor with a bargaining relationship with the Carpenters), the application for interim relief was dismissed

PROFESSIONAL CARPENTRY LTD.; RE THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL UNION, CARPENTERS AND ALLIED WORKERS, LOCAL 27,; RE UNIVERSAL

WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE ASPEN RIDGE HOMES LTD.; RE DOLE CONTRACTING INC .....(Jul/Aug) 739

Interim Relief – Certification – Practice and Procedure – Unfair Labour Practice – The Labourers sought interim reinstatement of K – As the employer conceded there was a serious issue to be tried and the circumstance occurred during an organizing campaign, the remaining issues were irreparable harm and balance of harm, and whether the termination of K was unrelated to the exercise of rights under the Act – Procedurally, the Board struck a reply declaration as it did not comply with Rule 19.3 (it was neither in response to a new issue which the applicant had no opportunity to address nor did it address issues the applicant could not have reasonably anticipated) – On the merits, the Board accepted the information in the ten declarations by the employer that no employee had asked about K's termination, nor had any employee indicated any understanding or belief that the end of K's employment with the Company was in any way connected to his support for the union organizing campaign – Additionally, the Board noted the timing of a number of events (including K's termination occurring 1 ½ months after the union represented to the employer and the Board that the campaign was dead) did not favour an inference that the employer knew K was a union organizer – The Board found nothing pleaded by the applicants that K's termination had caused irreparable harm or a "chilling effect" on the workplace – Accordingly, the interim application was dismissed

JAMES DICK CONSTRUCTION LIMITED, JAMES DICK HOLDINGS LIMITED, CALEDON SAND & GRAVEL INC., HAMILTON READY MIX LTD., ASSINCK LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506 .....(Jul/Aug) 708

Intervenor – Build-Up – Certification – Fraud – Reconsideration – Termination – Unfair Labour Practice – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues.

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 .....(Jul/Aug) 747

Judicial Review – Construction Industry Grievance – Timeliness – The Board had originally held that it had the discretion to accept a grievance referral under s. 133 of the Act, notwithstanding the language in the collective agreement that deemed a grievance filed beyond 14 days to be settled – On judicial review, applying a standard of reasonableness, the Divisional Court quashed the Board's determination: [2011] OLRB Rep September/October 629 – On appeal, the Court of Appeal upheld the Divisional Court ruling: the Board had to apply the terms of the collective agreement which deemed the grievance settled if it was not referred to arbitration within 14 days — The Court said the Board did not have the right to ignore the express terms of the collective agreement that addressed the grievance and arbitration procedures – Appeal dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE ONTARIO LABOUR RELATIONS BOARD.....(Jul/Aug) 756

Jurisdictional Dispute – Conciliation – Bargaining Rights – Reference – Voluntary Recognition – The Minister of Labour asked the Board whether she has the authority to appoint a conciliation officer in this matter, involving a bargaining unit of employees who work at various Dilico Anishinabek Family Care ("Dilico") centres – The Union obtained bargaining rights from the Canada Industrial Relations Board ("CIRB") – Dilico participated in the CIRB proceedings but always objected to CIRB jurisdiction over its labour relations – The Union issued notice to bargain a second renewal of the collective agreement, followed by a request to the Ontario Ministry of Labour for the appointment of a Conciliation Officer, both of which were objected to by Dilico – Dilico argued that it had never voluntarily recognized the union, that the union was never certified by the Board, and that Dilico had only engaged in bargaining because the Union had previously obtained those rights from the CIRB – The Union argued that Dilico's voluntary recognition for the Union was a product of the first collective agreement and was confirmed by the execution of the second collective agreement – Assuming, without deciding, that the Board has jurisdiction over the labour relations of Dilico, the Board stated that the voluntary recognition provision provides an alternative route to the normal certification procedures and that the language of the statute contemplates intention – Dilico's lack of intention was manifest throughout and their participation in the CIRB proceedings should not be seen as voluntary – Additionally, the Union was never certified by the Board – Accordingly, the Union had no legal right to serve an enforceable notice to bargain, which is a prerequisite to the appointment of a conciliation office by the Minister – The question referred to the Board is answered in the negative

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL 7-0-1; RE DILICO ANISHINABEK FAMILY CARE .....(Jul/Aug) 596

Jurisdictional Dispute – Construction industry Grievance Practice and Procedure Reconsideration – The Labourers sought reconsideration of a Board decision deferring the adjudication of a grievance pending the outcome of a jurisdictional dispute, arguing that the grievance relating to the sub-contracted work was insufficient to trigger a jurisdictional dispute, or insufficient to allow the jurisdictional dispute to take primacy over the grievance referral and cause it to be deferred – The Board held that its

longstanding jurisprudence clearly suggests that a multi-party dispute is much more efficiently and effectively addressed through the jurisdictional dispute process – The Labourers will not be deprived of their collective agreement argument when the underlying issue of the jurisdictional dispute is heard – Reconsideration denied; briefs ordered

DINEEN CONSTRUCTION LIMITED; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 46; RE MONALT ENVIRONMENTAL INC. .....(Jul/Aug) 626

Jurisdictional Dispute – Interim Order – The Carpenters sought an interim order in the context of a jurisdictional dispute over the assignment of certain carpentry trim work in the high-rise residential sector that was being performed by the Labourers – The Labourers, in a collective bargaining relationship with Provincial Carpentry, had been doing the trim work for approximately nine months when they were told they were being removed from the project and replaced by members of the Carpenters with a bargaining relationship with Dole Contracting – After one day of an informational picket established by the Labourers in protest of the re-assignment, the work was returned to Provincial and the Labourers – The Carpenters filed the jurisdictional dispute and sought to be placed on the project pending the outcome of the application – The Carpenters argued that the Labourers had engaged in illegal conduct by setting up the picket line and they should not be rewarded for these unlawful self-help efforts – The Labourers, for their part, denied any illegal conduct and argued that the Carpenters had not objected to the work assignment for nine months, and had not filed a grievance—in fact, could not do so—because they had no bargaining relationship with Provincial; it was only when the work was taken away from the Labourers and given to the Carpenters (and Dole) that the Carpenters were able to assert any rights over the work – The Board found that the Labourers, instead of waiting for the adjudication of its grievance or seeking a resolution to the jurisdictional dispute, intended to and did cause a work stoppage to protest the re-assignment of the work to the Carpenters: the conduct was improper and was not to be condoned – However, in the particular circumstances of this case, where it was not clear why Dole was awarded the work, and why it was being transferred to another contractor with a collective agreement with a different union, after nine months of uninterrupted (and unprotested) work by the Labourers working for Professional, and where a Carpenter win in the jurisdictional dispute would garner it a declaration only (the Board would not direct that the work be assigned to a particular contractor with a bargaining relationship with the Carpenters), the application for interim relief was dismissed

PROFESSIONAL CARPENTRY LTD.; RE THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL UNION, CARPENTERS AND ALLIED WORKERS, LOCAL 27,; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE ASPEN RIDGE HOMES LTD.; RE DOLE CONTRACTING INC .....(Jul/Aug) 739

Parties – Certification – Reconsideration – *State Immunity Act* – The Board previously granted DCMA's request to reconsider its decision certifying PSAC and directed a hearing to hear the evidence with respect to DCMA's claim for sovereign immunity under the *State Immunity Act* – The two issues were whether: 1) DCMA submitted (or attorned) to the jurisdiction of the OLRB as specifically contemplated by s. 4 of the *SIA*; and 2) the "commercial activity" exception to immunity applied, as specifically contemplated by s. 5 of the *SIA* – On the first issue the Board noted that an entity entitled to immunity that

unknowingly takes a step in a proceeding can only escape having attorned to the authority of the court if the facts "could not reasonably have been ascertained" – The Board found the following occurred: PSAC served the certification application on the Commander, who was an individual who had authority to enter into agreements; the Commander consulted with DCMA's own counsel in Virginia; a Response was filed which raised substantive issues, explicitly acknowledged it was an agency of the US Department of Defence, it agreed to a vote and where it would be conducted, proposed individuals as scrutineers and filed schedules of employees; it participated in the vote and sought to add its counsel to the list of people being contacted; participated by teleconference in the counting of the ballots; and participated in further discussions – Only several days later, in post vote representations does the DCMA raise the issue of sovereign immunity – Given all this involvement by the DCMA, the Board was not prepared to accept that these actions were taken without the knowledge of the rights being waived – Having found that DCMA waived immunity, the Board went on to determine the "commercial activity" exception – The Board noted that the DCMA is "responsible in ensuring the integrity of contractual processes providing a broad range of contract procurement management services," and although it is weapons that are being purchased, the DCMA neither negotiates nor awards the contracts, but just monitors the implementation of the contracts – The Board was not convinced that sovereign activity was "insuring that you get what you bought, on time and for the negotiated price – which is what DCMA does" – The Board found that the connection was not too tenuous to create the requisite nexus for commercial activity to be brought into play, particularly when to hold otherwise would be to deprive Canadian workers, working on Canadian soil, the benefits of Canadian law; when American employees of DCMA are already represented in collective bargaining by a trade union and when the Commander in testimony acknowledged he could manage if the employees were engaged in collective bargaining – Accordingly the Board concluded that if DCMA has not waived its state immunity and attorned to the jurisdiction of the Board, then it is not immune pursuant to s. 5 of the *SIA* because these proceedings related to a commercial activity – Interim Certificate issued

DEFENSE CONTRACT MANAGEMENT AGENCY – AMERICAS (CANADA); RE PUBLIC SERVICE ALLIANCE OF CANADA.....(Jul/Aug) 603

Practice and Procedure – Certification – Interim Relief – Unfair Labour Practice – The Labourers sought interim reinstatement of K – As the employer conceded there was a serious issue to be tried and the circumstance occurred during an organizing campaign, the remaining issues were irreparable harm and balance of harm, and whether the termination of K was unrelated to the exercise of rights under the Act – Procedurally, the Board struck a reply declaration as it did not comply with Rule 19.3 (it was neither in response to a new issue which the applicant had no opportunity to address nor did it address issues the applicant could not have reasonably anticipated) – On the merits, the Board accepted the information in the ten declarations by the employer that no employee had asked about K's termination, nor had any employee indicated any understanding or belief that the end of K's employment with the Company was in any way connected to his support for the union organizing campaign – Additionally, the Board noted the timing of a number of events (including K's termination occurring 1 ½ months after the union represented to the employer and the Board that the campaign was dead) did not favour an inference that the employer knew K was a union organizer – The Board found nothing pleaded by the applicants that K's termination had caused irreparable harm or a "chilling effect" on the workplace – Accordingly, the interim application was dismissed

JAMES DICK CONSTRUCTION LIMITED, JAMES DICK HOLDINGS LIMITED, CALEDON SAND & GRAVEL INC., HAMILTON READY MIX LTD., ASSINCK

LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506 .....(Jul/Aug) 708

Practice and Procedure Construction industry Grievance Jurisdictional Dispute Reconsideration – The Labourers sought reconsideration of a Board decision deferring the adjudication of a grievance pending the outcome of a jurisdictional dispute, arguing that the grievance relating to the sub-contracted work was insufficient to trigger a jurisdictional dispute, or insufficient to allow the jurisdictional dispute to take primacy over the grievance referral and cause it to be deferred – The Board held that its longstanding jurisprudence clearly suggests that a multi-party dispute is much more efficiently and effectively addressed through the jurisdictional dispute process – The Labourers will not be deprived of their collective agreement argument when the underlying issue of the jurisdictional dispute is heard – Reconsideration denied; briefs ordered

DINEEN CONSTRUCTION LIMITED; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 46; RE MONALT ENVIRONMENTAL INC .....(Jul/Aug) 626

Practice and Procedure – Employment Standards – The employer sought leave of the Board to dispense with service of its application on several hundred employees, and permission to make payment of the substantial order in instalments beyond the 30-day limit for filing the appeal – In the circumstances of this case, the Board relieved the employer of the obligation to serve each employee individually, requiring the employer to post its application and the Board's decision in the workplace (subject to personal delivery to employees no longer part of the employer's workforce) – With respect to the payment of the order into trust, the Board affirmed that historically it has not exercised its discretion to extend the time for filing until the full payment has been made – The Board stated, however, that if the employer paid the full amount of the order in accordance with its proposed schedule, it is likely that the Board will exercise its discretion to extend the time for filing to the date of the final payment – Matter proceeds

450477 ONTARIO LIMITED OPERATING AS CHARTRAND EQUIPMENT; RE JEAN-LOUISE ALBERT, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS .....(Jul/Aug) 577

Public Sector Labour Relations Transition Act – Bargaining Rights – Bargaining Unit – Previously the Board had determined that the creation of clinics in Sarnia and Chatham-Kent for ambulatory clients constituted a "health services integration" under *PSLRTA* and declared that PSLRTA applied – Nursing services to these ambulatory clients were previously provided on a home care basis by VON-Samia and VON-Chatham-Kent, for whom ONA held bargaining rights - Bayshore, a non-union employer, was the successful bidder to provide services to ambulatory clients through the clinics – The issue now before the Board under s. 22 of *PSLRTA* was the bargaining unit appropriate to Bayshore's operations after the health services integration having regard to the purposes of PSLRTA– Bayshore took the position that a bargaining unit restricted to the transferred service was appropriate, i.e. full-time RNs at the Clinics – ONA adopted the facts stated by Bayshore in response to a subsequent application for certification by another union, and argued that a bargaining unit of all RNs and all RPNs was appropriate to Bayshore's operations, given the high degree of integration of their work, terms and conditions of employment and supervision – The Board first noted that s. 22 does not confer bargaining rights upon a bargaining agent; rather section 23 requires a vote and

where 40% or more of the bargaining unit were not represented by a bargaining agent, as was the instant case, "no union" had to be an option on the ballot – Whether or not ONA's bargaining rights with respect to the transferred services were preserved was incidental to the determination of what bargaining unit was appropriate for Bayshore's operations – Based on the facts stated by Bayshore in the other application, and not disavowed by Bayshore in this application, the Board found that a bargaining unit of all RNs and RPNs was appropriate to Bayshore's operations – Consideration of the four purposes of *PSLRTA* did not change this result, given the degree of integration of RNs and RPNs in Bayshore's operations: 1) a bargaining unit of all RNs and RPNs is more likely to "encourage best practices that ensure delivery of quality and effective public services that are affordable for taxpayers" 2) there were no other bargaining units to be rationalized and the bargaining unit consisting of RNs and RPNs would result in effective collective bargaining structures; 3) either bargaining unit will come into effect only if a majority of the employees in the bargaining unit vote that they wish to be represented by ONA, however, only the bargaining unit consisting of all RNs and all RPNs would facilitate collective bargaining and 4) although integrating RNs and RPNs may reduce workplace disputes in the future, permitting the expansion of bargaining rights, absent agreement of the parties may not – The Board found however that this last concern gave way to all the other factors and determined the bargaining unit appropriate for Bayshore encompasses all RNs and RPNs – Matter continues

BAYSHORE HOME HEALTH; RE ONTARIO NURSES' ASSOCIATION; RE BAYSHORE HOME HEALTH, SARNIA; RE BAYSHORE HOME HEALTH, CHATHAM; RE VICTORIAN ORDER OF NURSES SARNIA-LAMBTON; RE VICTORIAN ORDER OF NURSES CHATHAM-KENT; RE ERIE ST. CLAIR COMMUNITY CARE ACCESS CENTRE .....(Jul/Aug) 584

Reconsideration – Build-Up – Certification – Fraud – Intervenor – Termination – Unfair Labour Practice – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues.

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD &

COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 .....(Jul/Aug) 747

Reconsideration – Certification – Parties – *State Immunity Act* – The Board previously granted DCMA's request to reconsider its decision certifying PSAC and directed a hearing to hear the evidence with respect to DCMA's claim for sovereign immunity under the *State Immunity Act* – The two issues were whether: 1) DCMA submitted (or attorned) to the jurisdiction of the OLRB as specifically contemplated by s. 4 of the *SIA*; and 2) the "commercial activity" exception to immunity applied, as specifically contemplated by s. 5 of the *SIA* – On the first issue the Board noted that an entity entitled to immunity that unknowingly takes a step in a proceeding can only escape having attorned to the authority of the court if the facts "could not reasonably have been ascertained" – The Board found the following occurred: PSAC served the certification application on the Commander, who was an individual who had authority to enter into agreements; the Commander consulted with DCMA's own counsel in Virginia; a Response was filed which raised substantive issues, explicitly acknowledged it was an agency of the US Department of Defence, it agreed to a vote and where it would be conducted, proposed individuals as scrutineers and filed schedules of employees; it participated in the vote and sought to add its counsel to the list of people being contacted; participated by teleconference in the counting of the ballots; and participated in further discussions – Only several days later, in post vote representations does the DCMA raise the issue of sovereign immunity – Given all this involvement by the DCMA, the Board was not prepared to accept that these actions were taken without the knowledge of the rights being waived – Having found that DCMA waived immunity, the Board went on to determine the "commercial activity" exception – The Board noted that the DCMA is "responsible in ensuring the integrity of contractual processes providing a broad range of contract procurement management services," and although it is weapons that are being purchased, the DCMA neither negotiates nor awards the contracts, but just monitors the implementation of the contracts – The Board was not convinced that sovereign activity was "insuring that you get what you bought, on time and for the negotiated price – which is what DCMA does" – The Board found that the connection was not too tenuous to create the requisite nexus for commercial activity to be brought into play, particularly when to hold otherwise would be to deprive Canadian workers, working on Canadian soil, the benefits of Canadian law; when American employees of DCMA are already represented in collective bargaining by a trade union and when the Commander in testimony acknowledged he could manage if the employees were engaged in collective bargaining – Accordingly the Board concluded that if DCMA has not waived its state immunity and attorned to the jurisdiction of the Board, then it is not immune pursuant to s. 5 of the *SIA* because these proceedings related to a commercial activity – Interim Certificate issued

DEFENSE CONTRACT MANAGEMENT AGENCY – AMERICAS (CANADA); RE PUBLIC SERVICE ALLIANCE OF CANADA.....(Jul/Aug) 603

Reconsideration – Construction industry Grievance – Jurisdictional Dispute – Practice and Procedure – The Labourers sought reconsideration of a Board decision deferring the adjudication of a grievance pending the outcome of a jurisdictional dispute, arguing that the grievance relating to the sub-contracted work was insufficient to trigger a jurisdictional dispute, or insufficient to allow the jurisdictional dispute to take primacy over the grievance referral and cause it to be deferred – The Board held that its longstanding jurisprudence clearly suggests that a multi-party dispute is much more efficiently and effectively addressed through the jurisdictional dispute process – The Labourers will not be deprived of their collective agreement argument when the

underlying issue of the jurisdictional dispute is heard – Reconsideration denied; briefs ordered

DINEEN CONSTRUCTION LIMITED; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 46; RE MONALT ENVIRONMENTAL INC. .....(Jul/Aug) 626

Reference – Jurisdictional Dispute – Conciliation – Bargaining Rights – Voluntary Recognition – The Minister of Labour asked the Board whether she has the authority to appoint a conciliation officer in this matter, involving a bargaining unit of employees who work at various Dilico Anishinabek Family Care ("Dilico") centres – The Union obtained bargaining rights from the Canada Industrial Relations Board ("CIRB") Dilico participated in the CIRB proceedings but always objected to CIRB jurisdiction over its labour relations – The Union issued notice to bargain a second renewal of the collective agreement, followed by a request to the Ontario Ministry of Labour for the appointment of a Conciliation Officer, both of which were objected to by Dilico – Dilico argued that it had never voluntarily recognized the union, that the union was never certified by the Board, and that Dilico had only engaged in bargaining because the Union had previously obtained those rights from the CIRB – The Union argued that Dilico's voluntary recognition for the Union was a product of the first collective agreement and was confirmed by the execution of the second collective agreement – Assuming, without deciding, that the Board has jurisdiction over the labour relations of Dilico, the Board stated that the voluntary recognition provision provides an alternative route to the normal certification procedures and that the language of the statute contemplates intention – Dilico's lack of intention was manifest throughout and their participation in the CIRB proceedings should not be seen as voluntary – Additionally, the Union was never certified by the Board – Accordingly, the Union had no legal right to serve an enforceable notice to bargain, which is a prerequisite to the appointment of a conciliation office by the Minister – The question referred to the Board is answered in the negative

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL 7-0-1; RE DILICO ANISHINABEK FAMILY CARE .....(Jul/Aug) 596

Related Employer – Unfair Labour Practice – CUPE brought a related employer application and an unfair labour practice complaint arising out of the Hamilton Health Sciences Corporation's ("the Hospital") termination of its contractual arrangements for cleaning services with Sodexo MS Canada Limited ("Sodexo") – The termination of the subcontract resulted in the layoff of Sodexo's cleaning staff who were represented by CUPE – The Union submitted that the responding parties (the Hospital and Sodexo) acted as a single employer or alternatively acted in concert to commit unfair labour practices by terminating the entire bargaining unit for making a lawful wage proposal – The Hospital and Sodexo argued that they ought not to be treated as one employer because they do not carry on associated or related activities or businesses and are not under common control or direction, and that the cancellation of the contract and the resulting layoffs were due to legitimate business decisions – The Board found that although there was cooperation and coordination between the respondents, this was not sufficient to conclude that they are under common control and direction – The Board found that there was no legitimate business rationale for the responding parties' conduct and concluded that this conduct--in particular the hasty timing of the contract cancellation in concert with earlier efforts to erode employee support for CUPE--constituted anti-union *animus* and were violations of the Act – The issue of remedial relief was remitted to the parties – Related employer application dismissed; unfair labour practices complaint allowed

HAMILTON HEALTH SCIENCES CORPORATION; RE CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 4800; RE SODEXO MS CANADA LIMITED.. (Jul/Aug) 645

Remedies – Duty of Fair Representation – Among other complaints the applicant alleged that her union failed to advise employees as part of the ratification process that the employer had given notice during collective bargaining of its intention to revert to the strict language of the collective agreement with respect to an article in the collective agreement addressing entitlement to work at home – The article required employees to request prior approval, although the employer had been allowing employees, such as the complainant, to work from home for some time without seeking prior approval – The employer did advise the union that it intended to strictly enforce the work at home article, however during the course of two ratification procedures the union did not advise the employees of the notice given by the employer – The Board found that this was not a case of an inadvertent mistake having been made in the material circulated during the ratification process, but rather a case of a complete absence of communication regarding the elimination of a term or condition of employment during a critically important part of the collective bargaining process – The Board found the failure of the union to advise employees that the employer was going to eliminate a term and condition of employment that they had enjoyed for a number of years reflected a complete disregard for the critical consequences to employees and undermined the statutory purpose of requiring ratification votes, and accordingly the failure was arbitrary and a breach of s. 74 – Concerning remedy the Board found that the complainant lost the opportunity to discuss the matter with fellow employees, which may or may not have gotten the issue back to the bargaining table and may or may not have resulted in some change – The Board advised the parties that it saw this as a mere loss of opportunity which will only attract nominal damages and remained seized to address damages if the parties could not agree on the quantum – Declaration made; Application granted in part

GAIL MYLES; RE ALLIANCE EMPLOYEES UNION (AEU); RE UNION OF NATIONAL EMPLOYEES .....(Jul/Aug) 633

Right of Access – This is an application under section 13 of the *Labour Relations Act* for an access order in the context of an organization drive – Many of the Respondent's employees reside at a camp owned by a third party – The Applicant was denied access to organize employees on the camp site – The Board can make an access order under section 13 of the Act in one of two situations: (1) the employee must either "reside on the property of the employer" or (2) "on property to which the employer has the right to control access" –The employer argued that the "right to control access" is tantamount to a right in ownership and that access to the camp is controlled by the third party who is the property owner – The Board found that access does not imply ownership and that the right to control access need not be exclusive to one party - The Board found that the Respondent controls access to the camp because the Respondent informs the third party who is, and who is not, to reside at the camp – The Board directed the Respondent to advise the third party that up to two representatives of the Applicant shall be admitted to the camp for the purpose of attempting to persuade the employees to join the Applicant – Right of access granted

LEDCOR CMI LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS); RE CONSTRUCTION WORKERS LOCAL 52 AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA.....(Jul/Aug) 731

State Immunity Act – Certification – Parties – Reconsideration – The Board previously granted DCMA's request to reconsider its decision certifying PSAC and directed a hearing to hear the evidence with respect to DCMA's claim for sovereign immunity under the *State Immunity Act* – The two issues were whether: 1) DCMA submitted (or attorned) to the jurisdiction of the OLRB as specifically contemplated by s. 4 of the *SIA*; and 2) the "commercial activity" exception to immunity applied, as specifically contemplated by s. 5 of the *SIA* – On the first issue the Board noted that an entity entitled to immunity that unknowingly takes a step in a proceeding can only escape having attorned to the authority of the court if the facts "could not reasonably have been ascertained" – The Board found the following occurred: PSAC served the certification application on the Commander, who was an individual who had authority to enter into agreements; the Commander consulted with DCMA's own counsel in Virginia; a Response was filed which raised substantive issues, explicitly acknowledged it was an agency of the US Department of Defence, it agreed to a vote and where it would be conducted, proposed individuals as scrutineers and filed schedules of employees; it participated in the vote and sought to add its counsel to the list of people being contacted; participated by teleconference in the counting of the ballots; and participated in further discussions – Only several days later, in post vote representations does the DCMA raise the issue of sovereign immunity – Given all this involvement by the DCMA, the Board was not prepared to accept that these actions were taken without the knowledge of the rights being waived – Having found that DCMA waived immunity, the Board went on to determine the "commercial activity" exception – The Board noted that the DCMA is "responsible in ensuring the integrity of contractual processes providing a broad range of contract procurement management services," and although it is weapons that are being purchased, the DCMA neither negotiates nor awards the contracts, but just monitors the implementation of the contracts – The Board was not convinced that sovereign activity was "insuring that you get what you bought, on time and for the negotiated price – which is what DCMA does" – The Board found that the connection was not too tenuous to create the requisite nexus for commercial activity to be brought into play, particularly when to hold otherwise would be to deprive Canadian workers, working on Canadian soil, the benefits of Canadian law; when American employees of DCMA are already represented in collective bargaining by a trade union and when the Commander in testimony acknowledged he could manage if the employees were engaged in collective bargaining – Accordingly the Board concluded that if DCMA has not waived its state immunity and attorned to the jurisdiction of the Board, then it is not immune pursuant to s. 5 of the *SIA* because these proceedings related to a commercial activity – Interim Certificate issued

DEFENSE CONTRACT MANAGEMENT AGENCY – AMERICAS (CANADA); RE PUBLIC SERVICE ALLIANCE OF CANADA.....(Jul/Aug) 603

Termination – Build-Up – Certification – Fraud – Intervenor – Reconsideration – Unfair Labour Practice – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a

necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues.

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 .....(Jul/Aug) 747

Timeliness – Construction Industry Grievance – Judicial Review – The Board had originally held that it had the discretion to accept a grievance referral under s. 133 of the Act, notwithstanding the language in the collective agreement that deemed a grievance filed beyond 14 days to be settled – On judicial review, applying a standard of reasonableness, the Divisional Court quashed the Board's determination: [2011] OLRB Rep September/October 629 – On appeal, the Court of Appeal upheld the Divisional Court ruling: the Board had to apply the terms of the collective agreement which deemed the grievance settled if it was not referred to arbitration within 14 days — The Court said the Board did not have the right to ignore the express terms of the collective agreement that addressed the grievance and arbitration procedures – Appeal dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE ONTARIO LABOUR RELATIONS BOARD.....(Jul/Aug) 756

Unfair Labour Practice – Build-Up – Certification – Fraud – Intervenor – Reconsideration – Termination – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further

submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 .....(Jul/Aug) 747

Unfair Labour Practice – Certification Interim Relief – Practice and Procedure – The Labourers sought interim reinstatement of K – As the employer conceded there was a serious issue to be tried and the circumstance occurred during an organizing campaign, the remaining issues were irreparable harm and balance of harm, and whether the termination of K was unrelated to the exercise of rights under the Act – Procedurally, the Board struck a reply declaration as it did not comply with Rule 19.3 (it was neither in response to a new issue which the applicant had no opportunity to address nor did it address issues the applicant could not have reasonably anticipated) – On the merits, the Board accepted the information in the ten declarations by the employer that no employee had asked about K's termination, nor had any employee indicated any understanding or belief that the end of K's employment with the Company was in any way connected to his support for the union organizing campaign – Additionally, the Board noted the timing of a number of events (including K's termination occurring 1 ½ months after the union represented to the employer and the Board that the campaign was dead) did not favour an inference that the employer knew K was a union organizer – The Board found nothing pleaded by the applicants that K's termination had caused irreparable harm or a "chilling effect" on the workplace – Accordingly, the interim application was dismissed

JAMES DICK CONSTRUCTION LIMITED, JAMES DICK HOLDINGS LIMITED, CALEDON SAND & GRAVEL INC., HAMILTON READY MIX LTD., ASSINCK LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506 .....(Jul/Aug) 708

Unfair Labour Practice – Related Employer – CUPE brought a related employer application and an unfair labour practice complaint arising out of the Hamilton Health Sciences Corporation's ("the Hospital") termination of its contractual arrangements for cleaning services with Sodexo MS Canada Limited ("Sodexo") The termination of the subcontract resulted in the layoff of Sodexo's cleaning staff who were represented by CUPE – The Union submitted that the responding parties (the Hospital and Sodexo) acted as a single employer or alternatively acted in concert to commit unfair labour practices by terminating the entire bargaining unit for making a lawful wage proposal – The Hospital and Sodexo argued that they ought not to be treated as one employer because they do not carry on associated or related activities or businesses and are not under common control or direction, and that the cancellation of the contract and the resulting layoffs were due to legitimate business decisions – The Board found that although there was cooperation and coordination between the respondents, this was not sufficient to conclude that they are under common control and direction – The Board found that there was no legitimate business rationale for the responding parties' conduct and concluded that this conduct--in particular the hasty timing of the contract cancellation in concert with earlier efforts to erode employee support for CUPE--constituted anti-union *animus* and were violations of the Act – The issue of remedial relief was remitted to the parties – Related employer application dismissed; unfair labour practices complaint allowed

HAMILTON HEALTH SCIENCES CORPORATION; RE CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 4800; RE SODEXO MS CANADA LIMITED....(Jul/Aug) 645

Voluntary Recognition – Jurisdictional Dispute – Conciliation – Bargaining Rights – Reference – The Minister of Labour asked the Board whether she has the authority to appoint a conciliation officer in this matter, involving a bargaining unit of employees who work at various Dilico Anishinabek Family Care ("Dilico") centres The Union obtained bargaining rights from the Canada Industrial Relations Board ("CIRB") Dilico participated in the CIRB proceedings but always objected to CIRB jurisdiction over its labour relations – The Union issued notice to bargain a second renewal of the collective agreement, followed by a request to the Ontario Ministry of Labour for the appointment of a Conciliation Officer, both of which were objected to by Dilico – Dilico argued that it had never voluntarily recognized the union, that the union was never certified by the Board, and that Dilico had only engaged in bargaining because the Union had previously obtained those rights from the CIRB – The Union argued that Dilico's voluntary recognition for the Union was a product of the first collective agreement and was confirmed by the execution of the second collective agreement – Assuming, without deciding, that the Board has jurisdiction over the labour relations of Dilico, the Board stated that the voluntary recognition provision provides an alternative route to the normal certification procedures and that the language of the statute contemplates intention – Dilico's lack of intention was manifest throughout and their participation in the CIRB proceedings should not be seen as voluntary – Additionally, the Union was never certified by the Board – Accordingly, the Union had no legal right to serve an enforceable notice to bargain, which is a prerequisite to the appointment of a conciliation office by the Minister – The question referred to the Board is answered in the negative

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL 7-0-1; RE DILICO ANISHINABEK FAMILY CARE .....(Jul/Aug) 596

Apprehension of Bias – Duty of Fair Representation – Judicial Review – The Applicant sought judicial review of a decision of the OLRB which dismissed the Applicant's complaint that the Algoma University Faculty Association had breached its duty of fair representation The Board found that the Association properly evaluated the circumstances of the Applicant's grievances, and did not breach its duty of fair representation in responding to those complaints – The Court accepted that the standard of review for the Board's decision was reasonableness, and found that the Board's dismissal of the application was reasonable – The Board was not required to hold an oral hearing – It was the Applicant's responsibility to present the necessary facts to the Board in the complaint or reply – The Applicant alleged that the Board lacked impartiality, however, the fact that the Vice-Chair of the Board had decided another application of the Applicant did not demonstrate any partiality – The Court found no evidence that the Board failed to respect the language rights of the Applicant – Application dismissed

RENÉ GAGNÉ; RE THE ONTARIO LABOUR RELATIONS BOARD; RE ALGOMA UNIVERSITY FACULTY ASSOCIATION..... (Sep/Oct) 919

Bargaining Unit – Certification – Construction Industry – Practice and Procedure – Termination – The applicants sought certification pursuant to section 158(2) of the Act to represent bargaining units of construction labourers and operating engineers in specified Board Areas for all sectors of the construction industry other than ICI – The applicants were attempting to displace the intervenor, who held bargaining rights for all employees, including construction labourers and operating engineers, employed by the responding party – The issue was the appropriate bargaining unit – The applicants argued that, despite their application to "carve out" a subset of the intervenor's bargaining rights, the bargaining unit was deemed appropriate under section 158(2) and the Board was not

required to find the *most appropriate* bargaining unit – The responding party and the intervenor argued that the applicants in such a displacement application must take the bargaining unit as they find it, submitting that the Board's approach to bargaining unit descriptions in a displacement application was an exception to section 158(2) – The Board held that the applicants must adduce their evidence first, since they knew on what facts they wanted to rely in order to show why the Board should depart from its displacement policy – With respect to the merits, the Board found that the applicants' bargaining unit was deemed to be appropriate under section 158(2) and that the applicants were entitled to "carve out" the proposed bargaining unit – The applications raised two distinct Board policies that might appear in conflict: the first is that the Board seeks to determine whether the applicant's proposed bargaining unit is appropriate, rather than attempting to determine the most appropriate bargaining unit; the second is that the Board in a displacement application normally finds the existing bargaining unit to be the appropriate unit – The Board found that those two policies were not inconsistent – Rather, the Board's approach in a displacement application was an *exception* to its usual practice of accepting the applicant's proposed bargaining unit, if appropriate, even if it was not the most appropriate bargaining unit – In these circumstances, the Board's displacement policy did not preclude the applicants from seeking to represent the employees in the bargaining units that they proposed – Matter continues.

EXPERCOM TELECOMMUNICATIONS INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 247; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE PORT PERRY EMPLOYEES ASSOCIATION ..... (Sep/Oct) 802

Certification – Bargaining Unit – Construction Industry – Practice and Procedure – Termination – The applicants sought certification pursuant to section 158(2) of the Act to represent bargaining units of construction labourers and operating engineers in specified Board Areas for all sectors of the construction industry other than ICI – The applicants were attempting to displace the intervenor, who held bargaining rights for all employees, including construction labourers and operating engineers, employed by the responding party – The issue was the appropriate bargaining unit – The applicants argued that, despite their application to "carve out" a subset of the intervenor's bargaining rights, the bargaining unit was deemed appropriate under section 158(2) and the Board was not required to find the *most appropriate* bargaining unit – The responding party and the intervenor argued that the applicants in such a displacement application must take the bargaining unit as they find it, submitting that the Board's approach to bargaining unit descriptions in a displacement application was an exception to section 158(2) – The Board held that the applicants must adduce their evidence first, since they knew on what facts they wanted to rely in order to show why the Board should depart from its displacement policy – With respect to the merits, the Board found that the applicants' bargaining unit was deemed to be appropriate under section 158(2) and that the applicants were entitled to "carve out" the proposed bargaining unit – The applications raised two distinct Board policies that might appear in conflict: the first is that the Board seeks to determine whether the applicant's proposed bargaining unit is appropriate, rather than attempting to determine the most appropriate bargaining unit; the second is that the Board in a displacement application normally finds the existing bargaining unit to be the appropriate unit – The Board found that those two policies were not inconsistent – Rather, the Board's approach in a displacement application was an *exception* to its usual practice of accepting the applicant's proposed bargaining unit, if appropriate, even if it was not the most appropriate bargaining unit – In these circumstances, the Board's

displacement policy did not preclude the applicants from seeking to represent the employees in the bargaining units that they proposed – Matter continues

EXPERCOM TELECOMMUNICATIONS INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 247; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE PORT PERRY EMPLOYEES ASSOCIATION ..... (Sep/Oct) 802

Certification – Construction Industry – Employer – One issue before the Board was whether four individuals were employees of the responding party – The Board reviewed the *York Condominium* "true employer" factors, and found that the SCC's more comprehensive test, with its non-exhaustive list, set out in *Pointe-Claire (City)* better enabled the Board to determine which party exercises the most control over all aspects of the work of the employees in question – The Board found the individuals were integrated more thoroughly into the operations of B.M. Metals than AMI, and that although a third connected business assigned some specific work to these individuals, B.M. Metals hired them to service a contract with Vale and they were only "rented" until needed – The two individuals were fundamentally part of the B.M. Metals organization and under the ultimate direction and control of B.M. Metals and accordingly employed by them – Certificates granted

B.M. METAL SERVICES INC.; RE ONTARIO PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA ..... (Sep/Oct) 782

Certification – Unfair Labour Practice – UNITE HERE complained that Novotel had interfered with its organizing campaign in four ways: (1) departmental "roundtable discussions" amounted to captive audience meetings during which the employer made threats to the employees' job security; (2) the virtual lay-off of the union's main organizer was meant to send a message to employees; (3) Novotel's practice of encouraging employees to report union activity amounted to surveillance and prevented employees from expressing their true wishes about the union at the vote; and (4) Novotel's provision of false or misleading information to employees equally precluded the employees from revealing their true wishes at the vote - The Board heard no direct evidence that Novotel directed, asked or encouraged employees to inform on their co-workers; management listened to the reports and kept track of them, but there was no evidence that employees knew of the information gathering – The Board found that Novotel generated false or misleading information regarding the employees' ability to retain their family doctors, or their ability to continue participating in the hotel's RRSP programs; although there was ample time between the dissemination of this information and the representation vote for the union to correct the misinformation, the union failed to do so; nonetheless, Novotel's conduct violated the Act - The employer's witnesses gave conflicting testimony regarding the diminution of the organizer's hours, and the concomitant creation of two full-time positions, neither of which was offered to the more senior employee/organizer – The Board found it was patently evident to all Novotel staff that the employee at issue was the chief organizer – Novotel was unable to persuade the Board that its conduct with respect to this employee, and the shift creation/changes was free of anti-union animus – Finally, the Board found that the employer's various discussions of job security, taken individually, might not cross the lines of free speech, but cumulatively constituted coercion, undue influence and interference Remedial certification ordered

Compensation for the discharged organizer, equivalent to her weekly hours of work, from her last day of work to the date of the decision

NOVOTEL CANADA INC.; RE UNITE HERE; RE ACCOR CANADA INC.; RE NOVOTEL MISSISSAUGA O/A HOTEL NOVOTEL TORONTO MISSISSAUGA CENTRE ..... (Sep/Oct) 836

Certification Where Act Contravened – Reconsideration – Remedies – Termination – The Board finds that a trade union seeking to rely on s. 11 relief predicated upon a contravention of the Act must at least file and deliver an application for certification if it expects to obtain a representation vote or remedial certification – Consistent with the scheme of the Act, the remedies available to the Board in subsection 11(2) are only available in circumstances where there is an application for certification – Matter continues

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 ..... (Sep/Oct) 909

Collective Agreement – Interest Arbitration – Reference – The Minister of Labour referred a number of questions to the Board for its advice pursuant to section 115 of the Act – The Union gave the City notice to bargain for renewal of the expired collective agreement – The Union advised the City that it would rely on Article 15.1 of the collective agreement to submit remaining matters in dispute to arbitration if bargaining was unsuccessful – Article 15.1 stated that if, after bargaining in good faith for the agreement's renewal, either party may notify the other party in writing of its desire to submit the matters in dispute to arbitration if it becomes satisfied that an agreement cannot be reached – Further, Article 15.1 provided that the Minister must appoint a single arbitrator upon the request of either party if the parties cannot agree to an arbitrator within fourteen days – The City argued that Article 15.1 was not an agreement of the parties as required by section 40(1) of the Act; that the Act provided a complete code governing collective bargaining in Ontario; that the Act provided for interest arbitration only in the circumstances set out in section 40(1); and that any provision for interest arbitration in a collective agreement is not authorized by the Act, and is accordingly unenforceable – First, the Board advised that Article 15.1 did not constitute an agreement of the parties to arbitrate within the meaning of section 40 of the Act – In order to engage section 40(1), parties must give notice to bargain and then have to agree in writing to refer all matters remaining in dispute between them to an arbitrator – Thus, there was no impediment to the Minister appointing a conciliation officer – Second, the Board advised that courts do not consider the Act as a complete code such that a collective agreement cannot include a dispute resolution mechanism other than those in the Act – Instead, the courts have found that the parties can agree to, or an interest arbitrator can order, the inclusion of an interest arbitration provision for the resolution of outstanding bargaining issues – Once a party has agreed to a dispute resolution mechanism, it cannot resile from that agreement, except perhaps on agreement or in the most extraordinary of circumstances – In this case, Article 15.1 would appear to be binding because the City agreed to it and it had not been removed through bargaining or by an interest arbitrator – Further, Article 15.1 did not affect the Minister's power to appoint a conciliation officer pursuant to section 18 of the Act – The Minister had the power to appoint an interest arbitrator when the parties failed to agree on one and nothing in Article 15.1 limited the Minister's authority in this regard – As such, where there has not been an agreement on a single arbitrator, and where the parties had agreed that either party could ask the Minister to make such an appointment,

the Board advised the Minister that she had the power under the Act to appoint an interest arbitrator – Advice given to the Minister

THE CITY OF HAMILTON; RE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1041 ..... (Sep/Oct) 880

Construction Industry – Bargaining Unit – Certification – Practice and Procedure – Termination – The applicants sought certification pursuant to section 158(2) of the Act to represent bargaining units of construction labourers and operating engineers in specified Board Areas for all sectors of the construction industry other than ICI – The applicants were attempting to displace the intervenor, who held bargaining rights for all employees, including construction labourers and operating engineers, employed by the responding party – The issue was the appropriate bargaining unit – The applicants argued that, despite their application to "carve out" a subset of the intervenor's bargaining rights, the bargaining unit was deemed appropriate under section 158(2) and the Board was not required to find the *most appropriate* bargaining unit – The responding party and the intervenor argued that the applicants in such a displacement application must take the bargaining unit as they find it, submitting that the Board's approach to bargaining unit descriptions in a displacement application was an exception to section 158(2) – The Board held that the applicants must adduce their evidence first, since they knew on what facts they wanted to rely in order to show why the Board should depart from its displacement policy – With respect to the merits, the Board found that the applicants' bargaining unit was deemed to be appropriate under section 158(2) and that the applicants were entitled to "carve out" the proposed bargaining unit – The applications raised two distinct Board policies that might appear in conflict: the first is that the Board seeks to determine whether the applicant's proposed bargaining unit is appropriate, rather than attempting to determine the most appropriate bargaining unit; the second is that the Board in a displacement application normally finds the existing bargaining unit to be the appropriate unit – The Board found that those two policies were not inconsistent – Rather, the Board's approach in a displacement application was an *exception* to its usual practice of accepting the applicant's proposed bargaining unit, if appropriate, even if it was not the most appropriate bargaining unit – In these circumstances, the Board's displacement policy did not preclude the applicants from seeking to represent the employees in the bargaining units that they proposed – Matter continues

EXPERCOM TELECOMMUNICATIONS INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 247; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE PORT PERRY EMPLOYEES ASSOCIATION..... (Sep/Oct) 802

Construction Industry – Certification – Employer – One issue before the Board was whether four individuals were employees of the responding party – The Board reviewed the *York Condominium* "true employer" factors, and found that the SCC's more comprehensive test, with its non-exhaustive list, set out in *Pointe-Claire (City)* better enabled the Board to determine which party exercises the most control over all aspects of the work of the employees in question The Board found the individuals were integrated more thoroughly into the operations of B.M. Metals than AMI, and that although a third connected business assigned some specific work to these individuals, B.M. Metals hired them to service a contract with Vale and they were only "rented" until needed – The two individuals were fundamentally part of the B.M. Metals organization and under the ultimate direction and control of B.M. Metals and accordingly employed by them – Certificates granted

B.M. METAL SERVICES INC.; RE ONTARIO PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA ..... (Sep/Oct) 782

Construction Industry Grievance – Damages – The Board in an earlier proceeding found the responding party had violated the subcontracting provision of its collective agreement with the applicant – The responding party subcontracted to Protectron through a purchase order which contained the express provision that Protectron was to "provide unionized labour only" – Protectron began the work using non-union labour, and the responding party took back the work and instead performed it with its direct, unionized employees – Protectron, disapproving of the responding party's response, went directly to the Hospital to obtain the work – Protectron was successful and the Hospital deleted the electrical security systems work from the responding party's contract – The issue in this phase of the grievance was the quantification of the applicant's damages, if any – The Board found the applicant was not entitled to any damages from the responding party because the subcontract to Protectron was not the cause of the applicant's loss – The Board held it will look to see whether the damages arose so necessarily and directly from the employer's breach that it was necessary to grant compensation – More specifically, the Board will award damages for a subcontracting violation where the subject employer had control of the work, but it will not award damages where the employer does not – In these circumstances, the applicant's loss arose from an independent event, namely Protectron's intervention to the Hospital, and not from the responding party's violation of the collective agreement – Indeed, the responding party no longer had any control over the electrical security systems work when that work was performed on a non-union basis – Applicant's request for damages dismissed

C & M ..... C & M ELECTRIC LTD.; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586 ..... (Sep/Oct) 796

Construction Industry Grievance – The IBEW grieved the assignment of electrical lighting upgrade work to a non-union contractor, arguing that the work at issue was construction and not maintenance – The Board considered the reasons for the work: (1) to save energy, as well as energy and maintenance costs; (2) to reduce inventory; (3) to comply with recent government regulations and industry standards; and (4) to obtain rebates and incentives for energy savings – The Board distinguished the recent ruling in *Electro Instal* and found that the wholesale replacement of a considerable number of components and fixtures, as well as the addition of new reflectors, produced an "alteration" of the lighting system to bring the work within the definition of construction – The system can now create the same amount of illumination using half the energy, and can operate twice as long for the same amount of electricity – Grievance allowed

JOHNSON CONTROLS LTD.; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1687 ..... (Sep/Oct) 820

Damages – Construction Industry Grievance – The Board in an earlier proceeding found the responding party had violated the subcontracting provision of its collective agreement with the applicant – The responding party subcontracted to Protectron through a purchase order which contained the express provision that Protectron was to "provide unionized labour only" – Protectron began the work using non-union labour, and the responding party took back the work and instead performed it with its direct, unionized employees –

Protectron, disapproving of the responding party's response, went directly to the Hospital to obtain the work – Protectron was successful and the Hospital deleted the electrical security systems work from the responding party's contract – The issue in this phase of the grievance was the quantification of the applicant's damages, if any – The Board found the applicant was not entitled to any damages from the responding party because the subcontract to Protectron was not the cause of the applicant's loss – The Board held it will look to see whether the damages arose so necessarily and directly from the employer's breach that it was necessary to grant compensation – More specifically, the Board will award damages for a subcontracting violation where the subject employer had control of the work, but it will not award damages where the employer does not – In these circumstances, the applicant's loss arose from an independent event, namely Protectron's intervention to the Hospital, and not from the responding party's violation of the collective agreement – Indeed, the responding party no longer had any control over the electrical security systems work when that work was performed on a non-union basis – Applicant's request for damages dismissed

C & M ..... C & M ELECTRIC LTD.; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586 ..... (Sep/Oct) 796

Discharge – Employment Standards – Wilful Misconduct – The employer sought review of an order to pay termination pay and unpaid wages to a former employee who worked and lived on the employer's farm as a labourer – The employee had signed an agreement to pay any hydro costs in excess of $100 per month while residing on the employer's farm and to have such an amount deducted from his pay – As required by Section 13(5) of the ESA, the authorization provided a formula from which a specific amount could be calculated – The deduction from wages was upheld but the amount was varied – On the termination issue, the Board found the employee had engaged in wilful misconduct by being rough with the employer's cows and destructive to the farming equipment and machinery – In addition, the employee was abusive to the employer's spouse – The Board stated that the test was whether the behaviour was so egregious that the employer could not be expected to permit the employee to work during the notice period; in other words, was the employee's presence in the workplace during the notice period "untenable"? – The Board found the employee's aggressive and inappropriate conduct on the farm made it unreasonable to have expected the Employer to permit him to work out his notice period – The employee was not entitled to termination pay – Order to Pay varied

MAPLEHURST FARMS LIMITED O/A MAPLEHURST FARMS; RE KEVIN SAYEAU; RE DIRECTOR OF EMPLOYMENT STANDARDS..... (Sep/Oct) 831

Duty of Fair Representation – Apprehension of Bias – Judicial Review – The Applicant sought judicial review of a decision of the OLRB which dismissed the Applicant's complaint that the Algoma University Faculty Association had breached its duty of fair representation – The Board found that the Association properly evaluated the circumstances of the Applicant's grievances, and did not breach its duty of fair representation in responding to those complaints – The Court accepted that the standard of review for the Board's decision was reasonableness, and found that the Board's dismissal of the application was reasonable – The Board was not required to hold an oral hearing – It was the Applicant's responsibility to present the necessary facts to the Board in the complaint or reply – The Applicant alleged that the Board lacked impartiality, however, the fact that the Vice-Chair of the Board had decided another application of the Applicant did not demonstrate any partiality – The Court found no evidence that the Board failed to respect the language rights of the Applicant – Application dismissed

RENÉ GAGNÉ; RE THE ONTARIO LABOUR RELATIONS BOARD; RE ALGOMA UNIVERSITY FACULTY ASSOCIATION ..... (Sep/Oct) 919

Employee – Judicial Review – The Board decision found that Human Resources Secretaries working for the applicant School Board were not employed in a confidential capacity in matters relating to labour relations nor exercising managerial functions and were therefore employees for the purposes of the Act – The Court found that the standard of review was reasonableness (the Board was interpreting its home statute and applying it to the evidence), and it was a fact-driven exercise lying within the Board's expertise – The Court found that the Board reasonably concluded that the test for exclusion relating to labour relations matters requires a demonstration that the employee's work relates to matters affecting a union representing him or her and that it was reasonable for the Board to identify the mischief to which the legislation was directed as a conflict of loyalty – The Court found the Board's interpretation of s. 1(3)(b) to be reasonable and its application of this interpretation to the facts was consistent with the Board's jurisprudence and fully supported by the evidence before it – Concerning the managerial exemption the Board applied its longstanding test, and found consistent with the evidence that the secretaries did not make "effective recommendations" – The reasons, having met the test of transparency, intelligibility and justification, were reasonable – Application for judicial review dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1348; RE ONTARIO LABOUR RELATIONS BOARD ..... (Sep/Oct) 917

Employee – Employment Standards – Status – The applicant sought review of the Officer's refusal to issue an order to pay unpaid wages, having found the applicant was not an employee, but an independent contractor within the meaning of the Act – Although the applicant had not signed a standard form contract which would have declared him to be an independent contractor, that fact was not dispositive of the issue – Rather, the Board found there were seven factors in the particular circumstances of this case that supported a finding the applicant was in business on his own account and was thus an independent contractor: (1) he retained significant independence; (2) he provided his own vehicle, which was the most fundamental "tool" as a pizza delivery driver, and he was responsible for all its expenses; (3) he was not required to work any particular shift; (4) supervision of how he worked was minimal to non-existent; (5) the distribution of shifts and orders was almost entirely left to the drivers to sort out; (6) he chose the routes to particular customers' homes, and did not necessarily follow the route recommended by the employer; and (7) there were no restrictions concerning his ability to work for anyone else – Application dismissed

6701141 CANADA LTD. OPERATING AS PIZZA HUT; RE TOMAS NASSAB; RE DIRECTOR OF EMPLOYMENT STANDARDS ..... (Sep/Oct) 768

Employer – Certification – Construction Industry – One issue before the Board was whether four individuals were employees of the responding party – The Board reviewed the *York Condominium* "true employer" factors, and found that the SCC's more comprehensive test, with its non-exhaustive list, set out in *Pointe-Claire (City)* better enabled the Board to determine which party exercises the most control over all aspects of the work of the employees in question The Board found the individuals were integrated more thoroughly into the operations of B.M. Metals than AMI, and that although a third connected business assigned some specific work to these individuals, B.M. Metals hired

them to service a contract with Vale and they were only "rented" until needed – The two individuals were fundamentally part of the B.M. Metals organization and under the ultimate direction and control of B.M. Metals and accordingly employed by them – Certificates granted

B.M. METAL SERVICES INC.; RE ONTARIO PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA ..... (Sep/Oct) 782

Employer – Interim Order – LIUNA 183 sought an interim order for the payment of wages to four workers, pending the resolution of a certification application and unfair labour practice complaint – The four workers, originally employed by Maximum at a worksite operated by BDC through a contracting arrangement between the companies, were discharged by BDC following LIUNA 183's application for certification for a bargaining unit of BDC employees – BDC subsequently asked for the workers to be reinstated, and for the original employment arrangements to be resumed – Maximum did not notify the employees, but the union was able to have them returned to work – BDC attempted to pay the employees by forwarding a cheque to Maximum (per the original contract) – Maximum refused to pay the employees – The Board found that neither responding party offered valid or even plausible explanations for the non-payment to the workers – Furthermore, the interim order was clearly brought within the context of an organizing campaign and the identity of the proper payor was a serious issue to be tried – The irreparable harm to the workers was patently obvious, and the failure to pay the workers appeared to be directly related to their exercise of rights under the Act – The responding parties were ordered to pay the workers their wages owing, as well as all future earnings until their employment is terminated – Interim Relief granted

BDC BULL DOZER CONSTRUCTION LTD. AND MAXIMUM CONSTRUCTION SERVICES; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 ..... (Sep/Oct) 773

Employment Standards – Discharge – Wilful Misconduct – The employer sought review of an order to pay termination pay and unpaid wages to a former employee who worked and lived on the employer's farm as a labourer – The employee had signed an agreement to pay any hydro costs in excess of $100 per month while residing on the employer's farm and to have such an amount deducted from his pay – As required by Section 13(5) of the ESA, the authorization provided a formula from which a specific amount could be calculated – The deduction from wages was upheld but the amount was varied – On the termination issue, the Board found the employee had engaged in wilful misconduct by being rough with the employer's cows and destructive to the farming equipment and machinery – In addition, the employee was abusive to the employer's spouse – The Board stated that the test was whether the behaviour was so egregious that the employer could not be expected to permit the employee to work during the notice period; in other words, was the employee's presence in the workplace during the notice period "untenable"? – The Board found the employee's aggressive and inappropriate conduct on the farm made it unreasonable to have expected the Employer to permit him to work out his notice period – The employee was not entitled to termination pay – Order to Pay varied

MAPLEHURST FARMS LIMITED O/A MAPLEHURST FARMS; RE KEVIN SAYEAU; RE DIRECTOR OF EMPLOYMENT STANDARDS..... (Sep/Oct) 831

Employment Standards – Employee – Status – The applicant sought review of the Officer's refusal to issue an order to pay unpaid wages, having found the applicant was not an employee, but an independent contractor within the meaning of the Act – Although the applicant had not signed a standard form contract which would have declared him to be an independent contractor, that fact was not dispositive of the issue – Rather, the Board found there were seven factors in the particular circumstances of this case that supported a finding the applicant was in business on his own account and was thus an independent contractor: (1) he retained significant independence; (2) he provided his own vehicle, which was the most fundamental "tool" as a pizza delivery driver, and he was responsible for all its expenses; (3) he was not required to work any particular shift; (4) supervision of how he worked was minimal to non-existent; (5) the distribution of shifts and orders was almost entirely left to the drivers to sort out; (6) he chose the routes to particular customers' homes, and did not necessarily follow the route recommended by the employer; and (7) there were no restrictions concerning his ability to work for anyone else – Application dismissed

6701141 CANADA LTD. OPERATING AS PIZZA HUT; RE TOMAS NASSAB; RE DIRECTOR OF EMPLOYMENT STANDARDS ..... (Sep/Oct) 768

Employment Standards – Judicial Review – The applicant sought judicial review of a Board decision in which the Board dismissed an application for review of an order to pay outstanding wages and vacation pay pursuant to the directors' liability provisions of the ESA – As a result of the applicant's failure to appear at the hearing, the Board treated his application as abandoned and confirmed the order to pay as made against him – At the judicial review hearing, the applicant argued he was denied procedural fairness because he was not able to address the amounts owing – He also argued the Board made mathematical errors in calculating the sum he was ordered to pay – The standard of review when the Board is interpreting the ESA is reasonableness – The Divisional Court found there was no procedural unfairness – Despite the applicant's effort to characterize the Board's actions as a denial of procedural fairness, he was in substance attacking the merits of the Board's decision to dismiss his application for review as abandoned – The Board's Rules of Procedure provide that where a person has received written notice of a hearing and fails to attend, the Board may decide an application without further notice to the person and without considering any documentation that the person may file at a later date – The applicant did not request an adjournment from the Board and the evidence showed that he knew how to contact the Board – In the circumstances, the Board reasonably proceeded in the applicant's absence Application for judicial review dismissed

RICHARD HOTTA, A DIRECTOR OF PROTEUS CRAFTWORKS INC.; RE MAHAMMAD BADIUZZAMAN ET AL; RE ONTARIO LABOUR RELATIONS BOARD ..... (Sep/Oct) 923

Employment Standards – Judicial Review – The applicant sought judicial review of a Board decision dismissing his appeal as untimely (six months after the order to pay was served) – The applicant had faxed a request to the Director of Employment Standards, rather than the Board, within 30 days advising he wished to file an appeal – The Court dismissed the claim that there was a breach of natural justice based on systemic bias, as there was no evidence on the record to support such a claim – The Court found the Board's decision that the appeal was untimely to be reasonable – The applicant had failed to file a timely application for review and failed to provide a reasonable explanation for his failure to do so, and the Board's application of these factors was reasonable – Application dismissed

SHAH ISLAM; RE J. ENNIS FABRICS LTD.; RE DIRECTOR OF EMPLOYMENT STANDARDS; RE ONTARIO LABOUR RELATIONS BOARD ..... (Sep/Oct) 925

Employment Standards – The Board dismissed the employee's application for review in which she sought amounts that were beyond those to which she was entitled under the ESA – The employer then sought costs after it prepared for a hearing in which it was entirely successful in a matter for which the employee had no prospect of success – The employer also made the necessary yet costly arrangements to appear after the employee refused to consent to an adjournment – The Board held it could not award costs because it did not have any legislative authority to do so – The ESA does not provide the Board with any authority to award costs, and although the SPPA provides this authority to tribunals where they have made specific Rules, the Board has not made any Rules related to costs – There are sound policy reasons for not awarding costs – The ESA is not meant to punish or deter an individual, who is often self-represented, unsophisticated, or vulnerable, from using the mechanisms provided for in the ESA – Further, any authority to award costs would most likely result in an increase in litigation – Accordingly, the employer's request was dismissed – Application for review dismissed

S. WILSON & CO. BAILIFFS LIMITED; RE GILDA DEL CASTILLO; RE DIRECTOR OF EMPLOYMENT STANDARDS ..... (Sep/Oct) 906

Interest Arbitration – Collective Agreement – Reference – The Minister of Labour referred a number of questions to the Board for its advice pursuant to section 115 of the Act – The Union gave the City notice to bargain for renewal of the expired collective agreement – The Union advised the City that it would rely on Article 15.1 of the collective agreement to submit remaining matters in dispute to arbitration if bargaining was unsuccessful – Article 15.1 stated that if, after bargaining in good faith for the agreement's renewal, either party may notify the other party in writing of its desire to submit the matters in dispute to arbitration if it becomes satisfied that an agreement cannot be reached – Further, Article 15.1 provided that the Minister must appoint a single arbitrator upon the request of either party if the parties cannot agree to an arbitrator within fourteen days – The City argued that Article 15.1 was not an agreement of the parties as required by section 40(1) of the Act; that the Act provided a complete code governing collective bargaining in Ontario; that the Act provided for interest arbitration only in the circumstances set out in section 40(1); and that any provision for interest arbitration in a collective agreement is not authorized by the Act, and is accordingly unenforceable – First, the Board advised that Article 15.1 did not constitute an agreement of the parties to arbitrate within the meaning of section 40 of the Act – In order to engage section 40(1), parties must give notice to bargain and then have to agree in writing to refer all matters remaining in dispute between them to an arbitrator – Thus, there was no impediment to the Minister appointing a conciliation officer – Second, the Board advised that courts do not consider the Act as a complete code such that a collective agreement cannot include a dispute resolution mechanism other than those in the Act – Instead, the courts have found that the parties can agree to, or an interest arbitrator can order, the inclusion of an interest arbitration provision for the resolution of outstanding bargaining issues – Once a party has agreed to a dispute resolution mechanism, it cannot resile from that agreement, except perhaps on agreement or in the most extraordinary of circumstances – In this case, Article 15.1 would appear to be binding because the City agreed to it and it had not been removed through bargaining or by an interest arbitrator – Further, Article 15.1 did not affect the Minister's power to appoint a conciliation officer pursuant to section 18 of the Act – The Minister had the power to appoint an interest arbitrator when the parties failed to agree on one and nothing in Article 15.1 limited the Minister's authority in this regard – As such, where there has not been an agreement on a single arbitrator, and where the

parties had agreed that either party could ask the Minister to make such an appointment, the Board advised the Minister that she had the power under the Act to appoint an interest arbitrator – Advice given to the Minister

THE CITY OF HAMILTON; RE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1041 ..... (Sep/Oct) 880

Interim Order – Employer - LIUNA 183 sought an interim order for the payment of wages to four workers, pending the resolution of a certification application and unfair labour practice complaint – The four workers, originally employed by Maximum at a worksite operated by BDC through a contracting arrangement between the companies, were discharged by BDC following LIUNA 183's application for certification for a bargaining unit of BDC employees – BDC subsequently asked for the workers to be reinstated, and for the original employment arrangements to be resumed – Maximum did not notify the employees, but the union was able to have them returned to work – BDC attempted to pay the employees by forwarding a cheque to Maximum (per the original contract) – Maximum refused to pay the employees – The Board found that neither responding party offered valid or even plausible explanations for the non-payment to the workers – Furthermore, the interim order was clearly brought within the context of an organizing campaign and the identity of the proper payor was a serious issue to be tried – The irreparable harm to the workers was patently obvious, and the failure to pay the workers appeared to be directly related to their exercise of rights under the Act – The responding parties were ordered to pay the workers their wages owing, as well as all future earnings until their employment is terminated – Interim Relief granted

BDC BULL DOZER CONSTRUCTION LTD. AND MAXIMUM CONSTRUCTION SERVICES; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 ..... (Sep/Oct) 773

Judicial Review – Duty of Fair Representation – Apprehension of Bias – The Applicant sought judicial review of a decision of the OLRB which dismissed the Applicant's complaint that the Algoma University Faculty Association had breached its duty of fair representation – The Board found that the Association properly evaluated the circumstances of the Applicant's grievances, and did not breach its duty of fair representation in responding to those complaints – The Court accepted that the standard of review for the Board's decision was reasonableness, and found that the Board's dismissal of the application was reasonable – The Board was not required to hold an oral hearing – It was the Applicant's responsibility to present the necessary facts to the Board in the complaint or reply – The Applicant alleged that the Board lacked impartiality, however, the fact that the Vice-Chair of the Board had decided another application of the Applicant did not demonstrate any partiality – The Court found no evidence that the Board failed to respect the language rights of the Applicant – Application dismissed

RENÉ GAGNÉ; RE THE ONTARIO LABOUR RELATIONS BOARD; RE ALGOMA UNIVERSITY FACULTY ASSOCIATION ..... (Sep/Oct) 919

Judicial Review – Employee – The Board decision found that Human Resources Secretaries working for the applicant School Board were not employed in a confidential capacity in matters relating to labour relations nor exercising managerial functions and were therefore employees for the purposes of the Act – The Court found that the standard of review was reasonableness (the Board was interpreting its home statute and applying it to the evidence), and it was a fact-driven exercise lying within the Board's expertise – The Court found that the Board reasonably concluded that the test for exclusion relating to

labour relations matters requires a demonstration that the employee's work relates to matters affecting a union representing him or her and that it was reasonable for the Board to identify the mischief to which the legislation was directed as a conflict of loyalty – The Court found the Board's interpretation of s. 1(3)(b) to be reasonable and its application of this interpretation to the facts was consistent with the Board's jurisprudence and fully supported by the evidence before it – Concerning the managerial exemption the Board applied its longstanding test, and found consistent with the evidence that the secretaries did not make "effective recommendations" – The reasons, having met the test of transparency, intelligibility and justification, were reasonable – Application for judicial review dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1348; RE ONTARIO LABOUR RELATIONS BOARD ..... (Sep/Oct) 917

Judicial Review – Employment Standards – The applicant sought judicial review of a Board decision in which the Board dismissed an application for review of an order to pay outstanding wages and vacation pay pursuant to the directors' liability provisions of the ESA – As a result of the applicant's failure to appear at the hearing, the Board treated his application as abandoned and confirmed the order to pay as made against him – At the judicial review hearing, the applicant argued he was denied procedural fairness because he was not able to address the amounts owing – He also argued the Board made mathematical errors in calculating the sum he was ordered to pay – The standard of review when the Board is interpreting the ESA is reasonableness – The Divisional Court found there was no procedural unfairness – Despite the applicant's effort to characterize the Board's actions as a denial of procedural fairness, he was in substance attacking the merits of the Board's decision to dismiss his application for review as abandoned – The Board's Rules of Procedure provide that where a person has received written notice of a hearing and fails to attend, the Board may decide an application without further notice to the person and without considering any documentation that the person may file at a later date – The applicant did not request an adjournment from the Board and the evidence showed that he knew how to contact the Board – In the circumstances, the Board reasonably proceeded in the applicant's absence – Application for judicial review dismissed

RICHARD HOTTA, A DIRECTOR OF PROTEUS CRAFTWORKS INC.; RE MAHAMMAD BADIUZZAMAN ET AL; RE ONTARIO LABOUR RELATIONS BOARD ..... (Sep/Oct) 923

Judicial Review – Employment Standards – The applicant sought judicial review of a Board decision dismissing his appeal as untimely (six months after the order to pay was served) – The applicant had faxed a request to the Director of Employment Standards, rather than the Board, within 30 days advising he wished to file an appeal – The Court dismissed the claim that there was a breach of natural justice based on systemic bias, as there was no evidence on the record to support such a claim – The Court found the Board's decision that the appeal was untimely to be reasonable – The applicant had failed to file a timely application for review and failed to provide a reasonable explanation for his failure to do so, and the Board's application of these factors was reasonable – Application dismissed

SHAH ISLAM; RE J. ENNIS FABRICS LTD.; RE DIRECTOR OF EMPLOYMENT STANDARDS; RE ONTARIO LABOUR RELATIONS BOARD ..... (Sep/Oct) 925

Judicial Review – Sale of Business – The Board's decision found there was a sale of business based on an individual being a "key individual" in both the predecessor and new company – The parties agreed the standard of review was reasonableness – The Court found the Board identified the evidence it relied upon for its findings of fact and the line of reasoning that led from these findings of fact to its conclusion – The Court also found the Board's decision made it clear why it reached the conclusion it did and that it was within a range of reasonable outcomes – Accordingly the *Dunsmuir* test was satisfied – Application dismissed

ALLIANCE ENVIRONMENTAL AND ABATEMENT CONTRACTORS INC.; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES LOCAL 1891; RE ONTARIO LABOUR RELATIONS BOARD ..... (Sep/Oct) 914

Practice and Procedure – Bargaining Unit – Certification - Construction Industry –Termination – The applicants sought certification pursuant to section 158(2) of the Act to represent bargaining units of construction labourers and operating engineers in specified Board Areas for all sectors of the construction industry other than ICI – The applicants were attempting to displace the intervenor, who held bargaining rights for all employees, including construction labourers and operating engineers, employed by the responding party – The issue was the appropriate bargaining unit – The applicants argued that, despite their application to "carve out" a subset of the intervenor's bargaining rights, the bargaining unit was deemed appropriate under section 158(2) and the Board was not required to find the *most appropriate* bargaining unit – The responding party and the intervenor argued that the applicants in such a displacement application must take the bargaining unit as they find it, submitting that the Board's approach to bargaining unit descriptions in a displacement application was an exception to section 158(2) – The Board held that the applicants must adduce their evidence first, since they knew on what facts they wanted to rely in order to show why the Board should depart from its displacement policy – With respect to the merits, the Board found that the applicants' bargaining unit was deemed to be appropriate under section 158(2) and that the applicants were entitled to "carve out" the proposed bargaining unit – The applications raised two distinct Board policies that might appear in conflict: the first is that the Board seeks to determine whether the applicant's proposed bargaining unit is appropriate, rather than attempting to determine the most appropriate bargaining unit; the second is that the Board in a displacement application normally finds the existing bargaining unit to be the appropriate unit – The Board found that those two policies were not inconsistent – Rather, the Board's approach in a displacement application was an *exception* to its usual practice of accepting the applicant's proposed bargaining unit, if appropriate, even if it was not the most appropriate bargaining unit – In these circumstances, the Board's displacement policy did not preclude the applicants from seeking to represent the employees in the bargaining units that they proposed – Matter continues

EXPERCOM TELECOMMUNICATIONS INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 247; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE PORT PERRY EMPLOYEES ASSOCIATION ..... (Sep/Oct) 802

Reconsideration – Certification Where Act Contravened – Remedies – Termination – The Board finds that a trade union seeking to rely on s. 11 relief predicated upon a contravention of the Act must at least file and deliver an application for certification if it expects to obtain a representation vote or remedial certification – Consistent with the scheme of the Act, the remedies available to the Board in subsection 11(2) are only available in circumstances where there is an application for certification – Matter continues

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 ..... (Sep/Oct) 909

Reference – Collective Agreement – Interest Arbitration – The Minister of Labour referred a number of questions to the Board for its advice pursuant to section 115 of the Act – The Union gave the City notice to bargain for renewal of the expired collective agreement – The Union advised the City that it would rely on Article 15.1 of the collective agreement to submit remaining matters in dispute to arbitration if bargaining was unsuccessful – Article 15.1 stated that if, after bargaining in good faith for the agreement's renewal, either party may notify the other party in writing of its desire to submit the matters in dispute to arbitration if it becomes satisfied that an agreement cannot be reached – Further, Article 15.1 provided that the Minister must appoint a single arbitrator upon the request of either party if the parties cannot agree to an arbitrator within fourteen days – The City argued that Article 15.1 was not an agreement of the parties as required by section 40(1) of the Act; that the Act provided a complete code governing collective bargaining in Ontario; that the Act provided for interest arbitration only in the circumstances set out in section 40(1); and that any provision for interest arbitration in a collective agreement is not authorized by the Act, and is accordingly unenforceable – First, the Board advised that Article 15.1 did not constitute an agreement of the parties to arbitrate within the meaning of section 40 of the Act – In order to engage section 40(1), parties must give notice to bargain and then have to agree in writing to refer all matters remaining in dispute between them to an arbitrator – Thus, there was no impediment to the Minister appointing a conciliation officer – Second, the Board advised that courts do not consider the Act as a complete code such that a collective agreement cannot include a dispute resolution mechanism other than those in the Act – Instead, the courts have found that the parties can agree to, or an interest arbitrator can order, the inclusion of an interest arbitration provision for the resolution of outstanding bargaining issues – Once a party has agreed to a dispute resolution mechanism, it cannot resile from that agreement, except perhaps on agreement or in the most extraordinary of circumstances – In this case, Article 15.1 would appear to be binding because the City agreed to it and it had not been removed through bargaining or by an interest arbitrator – Further, Article 15.1 did not affect the Minister's power to appoint a conciliation officer pursuant to section 18 of the Act – The Minister had the power to appoint an interest arbitrator when the parties failed to agree on one and nothing in Article 15.1 limited the Minister's authority in this regard – As such, where there has not been an agreement on a single arbitrator, and where the parties had agreed that either party could ask the Minister to make such an appointment, the Board advised the Minister that she had the power under the Act to appoint an interest arbitrator – Advice given to the Minister

THE CITY OF HAMILTON; RE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1041 ..... (Sep/Oct) 880

Remedies – Certification Where Act Contravened – Reconsideration – Termination – The Board finds that a trade union seeking to rely on s. 11 relief predicated upon a contravention of the Act must at least file and deliver an application for certification if it expects to obtain a representation vote or remedial certification – Consistent with the scheme of the Act, the remedies available to the Board in subsection 11(2) are only available in circumstances where there is an application for certification – Matter continues

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 ..... (Sep/Oct) 909

Sale of Business – Judicial Review – The Board's decision found there was a sale of business based on an individual being a "key individual" in both the predecessor and new company – The parties agreed the standard of review was reasonableness – The Court found the Board identified the evidence it relied upon for its findings of fact and the line of reasoning that led from these findings of fact to its conclusion – The Court also found the Board's decision made it clear why it reached the conclusion it did and that it was within a range of reasonable outcomes – Accordingly the *Dunsmuir* test was satisfied – Application dismissed

ALLIANCE ENVIRONMENTAL AND ABATEMENT CONTRACTORS INC.; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES LOCAL 1891; RE ONTARIO LABOUR RELATIONS BOARD ..... (Sep/Oct) 914

Status – Employment Standards – Employee – The applicant sought review of the Officer's refusal to issue an order to pay unpaid wages, having found the applicant was not an employee, but an independent contractor within the meaning of the Act – Although the applicant had not signed a standard form contract which would have declared him to be an independent contractor, that fact was not dispositive of the issue – Rather, the Board found there were seven factors in the particular circumstances of this case that supported a finding the applicant was in business on his own account and was thus an independent contractor: (1) he retained significant independence; (2) he provided his own vehicle, which was the most fundamental "tool" as a pizza delivery driver, and he was responsible for all its expenses; (3) he was not required to work any particular shift; (4) supervision of how he worked was minimal to non-existent; (5) the distribution of shifts and orders was almost entirely left to the drivers to sort out; (6) he chose the routes to particular customers' homes, and did not necessarily follow the route recommended by the employer; and (7) there were no restrictions concerning his ability to work for anyone else – Application dismissed

6701141 CANADA LTD. OPERATING AS PIZZA HUT; RE TOMAS NASSAB; RE DIRECTOR OF EMPLOYMENT STANDARDS ..... (Sep/Oct) 768

Termination – Bargaining Unit – Certification - Construction Industry – Practice and Procedure – The applicants sought certification pursuant to section 158(2) of the Act to represent bargaining units of construction labourers and operating engineers in specified Board Areas for all sectors of the construction industry other than ICI – The applicants were attempting to displace the intervenor, who held bargaining rights for all employees, including construction labourers and operating engineers, employed by the responding party – The issue was the appropriate bargaining unit – The applicants argued that, despite their application to "carve out" a subset of the intervenor's bargaining rights, the bargaining unit was deemed appropriate under section 158(2) and the Board was not required to find the *most appropriate* bargaining unit – The responding party and the intervenor argued that the applicants in such a displacement application must take the bargaining unit as they find it, submitting that the Board's approach to bargaining unit descriptions in a displacement application was an exception to section 158(2) – The Board held that the applicants must adduce their evidence first, since they knew on what facts they wanted to rely in order to show why the Board should depart from its displacement policy – With respect to the merits, the Board found that the applicants'

bargaining unit was deemed to be appropriate under section 158(2) and that the applicants were entitled to "carve out" the proposed bargaining unit – The applications raised two distinct Board policies that might appear in conflict: the first is that the Board seeks to determine whether the applicant's proposed bargaining unit is appropriate, rather than attempting to determine the most appropriate bargaining unit; the second is that the Board in a displacement application normally finds the existing bargaining unit to be the appropriate unit – The Board found that those two policies were not inconsistent – Rather, the Board's approach in a displacement application was an *exception* to its usual practice of accepting the applicant's proposed bargaining unit, if appropriate, even if it was not the most appropriate bargaining unit – In these circumstances, the Board's displacement policy did not preclude the applicants from seeking to represent the employees in the bargaining units that they proposed – Matter continues

EXPERCOM TELECOMMUNICATIONS INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 247; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE PORT PERRY EMPLOYEES ASSOCIATION ..... (Sep/Oct) 802

Termination – Certification Where Act Contravened – Reconsideration – Remedies – The Board finds that a trade union seeking to rely on s. 11 relief predicated upon a contravention of the Act must at least file and deliver an application for certification if it expects to obtain a representation vote or remedial certification – Consistent with the scheme of the Act, the remedies available to the Board in subsection 11(2) are only available in circumstances where there is an application for certification – Matter continues

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 ..... (Sep/Oct) 909

Unfair Labour Practice – Certification – UNITE HERE complained that Novotel had interfered with its organizing campaign in four ways: (1) departmental "roundtable discussions" amounted to captive audience meetings during which the employer made threats to the employees' job security; (2) the virtual lay-off of the union's main organizer was meant to send a message to employees; (3) Novotel's practice of encouraging employees to report union activity amounted to surveillance and prevented employees from expressing their true wishes about the union at the vote; and (4) Novotel's provision of false or misleading information to employees equally precluded the employees from revealing their true wishes at the vote - The Board heard no direct evidence that Novotel directed, asked or encouraged employees to inform on their co-workers; management listened to the reports and kept track of them, but there was no evidence that employees knew of the information gathering – The Board found that Novotel generated false or misleading information regarding the employees' ability to retain their family doctors, or their ability to continue participating in the hotel's RRSP programs; although there was ample time between the dissemination of this information and the representation vote for the union to correct the misinformation, the union failed to do so; nonetheless, Novotel's conduct violated the Act - The employer's witnesses gave conflicting testimony regarding the diminution of the organizer's hours, and the concomitant creation of two full-time positions, neither of which was offered to the more senior employee/organizer – The Board found it was patently evident to all Novotel staff that the employee at issue was the chief organizer – Novotel was unable to persuade the Board that its conduct with respect to this employee, and the shift creation/changes was free of anti-union animus – Finally,

the Board found that the employer's various discussions of job security, taken individually, might not cross the lines of free speech, but cumulatively constituted coercion, undue influence and interference – Remedial certification ordered – Compensation for the discharged organizer, equivalent to her weekly hours of work, from her last day of work to the date of the decision

NOVOTEL CANADA INC.; RE UNITE HERE; RE ACCOR CANADA INC.; RE NOVOTEL MISSISSAUGA O/A HOTEL NOVOTEL TORONTO MISSISSAUGA CENTRE..... (Sep/Oct) 836

Wilful Misconduct – Employment Standards – Discharge – The employer sought review of an order to pay termination pay and unpaid wages to a former employee who worked and lived on the employer's farm as a labourer – The employee had signed an agreement to pay any hydro costs in excess of $100 per month while residing on the employer's farm and to have such an amount deducted from his pay – As required by Section 13(5) of the ESA, the authorization provided a formula from which a specific amount could be calculated – The deduction from wages was upheld but the amount was varied – On the termination issue, the Board found the employee had engaged in wilful misconduct by being rough with the employer's cows and destructive to the farming equipment and machinery – In addition, the employee was abusive to the employer's spouse – The Board stated that the test was whether the behaviour was so egregious that the employer could not be expected to permit the employee to work during the notice period; in other words, was the employee's presence in the workplace during the notice period "untenable"? – The Board found the employee's aggressive and inappropriate conduct on the farm made it unreasonable to have expected the Employer to permit him to work out his notice period – The employee was not entitled to termination pay – Order to Pay varied

MAPLEHURST FARMS LIMITED O/A MAPLEHURST FARMS; RE KEVIN SAYEAU; RE DIRECTOR OF EMPLOYMENT STANDARDS..... (Sep/Oct) 831

Abandonment – Practice and Procedure Unfair Labour Practice – The Board found it reasonable to infer from the fact that the applicant did nothing to advance this application for a period of four years and five months that the application was, at some point during such period of inactivity, abandoned by the applicant – Application dismissed

ARTHUR COELHO & SONS MASONRY; MASONRY INDUSTRY EMPLOYERS' COUNCIL OF ONTARIO AND OTTAWA REGION MASONRY CONTRACTORS ASSOCIATION; INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 7 ARTHUR COELHO O/A OTTAWA MASONRY, 6468721 CANADA, INC. O/A CDO MASONRY, AND M.A.C. MACONNERIE MASONRY ..... (Nov/Dec) 940

Bargaining Rights – Termination – Voluntary Recognition – The Board was asked to rule on the validity of a voluntary recognition agreement entered into by the SEIU and SteriPro – The OWU applied to displace the SEIU in two bargaining units of employees at Humber River Regional Hospital – Before the Board issued its decisions certifying the OWU, the work of the bargaining units was transferred to SteriPro – The SEIU and SteriPro entered into a VRA, relying on the contracting out provision in the original collective agreement between SEIU and the Hospital – The Board found that there was no need for evidence of employee support to make the VRA valid: it was sufficient that, at the time the parties entered into the VRA, the SEIU was the legitimate bargaining agent for the employees, with language in its collective agreement that gave it a legal right to continue in that role

with a new employer – Application to terminate bargaining rights dismissed – Related matters continue

STERIPRO CANADA LIMITED PARTNERSHIP; RE ONTARIO WORKERS' UNION; RE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1 CANADA; RE HUMBER RIVER REGIONAL HOSPITAL.....(Nov/Dec) 1107

Bargaining Unit – Certification – Construction Industry – LIUNA brought two applications to be certified as the bargaining agent for all construction labourers working for the employer in all non-ICI sectors in Board areas 26 and 27 – The Board found that three employees performed the work of construction labourers on the application date in both Board areas – The employer argued that those workers should be included in both bargaining units for the purpose of the two certification applications – LIUNA argued that those workers should only be included in one bargaining unit for the Board area in which they spent the "majority of time" on the application date - The Board rejected as impractical the application of the "majority of time test" in order to determine to which Board area bargaining unit an employee belonged on the application date – The Board also rejected the union's submission that an employee cannot belong to more than one bargaining unit in different geographical locations on the application date (although it did maintain that an employee can only belong to one *craft* bargaining unit in a particular geographic location on the application date) – If an employee works for an employer and performs, for a majority of time on the application date, the tasks associated with the applicant's craft unit in the geographic area covered by the application for certification, that employee is in the bargaining unit regardless of what else he or she may do outside the bargaining unit for the employer or anyone else – Accordingly, the Board found that the three workers who performed construction labourer's work in both Board areas on the application date were bargaining unit employees for the purpose of both applications – The Board area 27 application was dismissed since LIUNA filed membership information for less than 40% of the bargaining unit – The Board certified LIUNA for Board area 26, as more than 55% of the workers in the bargaining unit were members of constituent locals of the applicant at the time the application was filed – One application dismissed; the other granted

COUNTRY GREEN HOMES INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL....(Nov/Dec) 979

Bargaining Unit – Certification – The City objected to an application for certification brought by CUPE Local 79 for a bargaining unit of security guards, arguing that a conflict of interest would result because the Local already represents numerous other of the City's employees – The Board considered the various categories of guards employed by the City and the history of their employment responsibilities with the City (post-amalgamation), and concluded that their main roles are to assist members of the public by giving directions or providing information, and to protect City property from outside threats; the security officers do not engage in monitoring of other employees to cause a conflict of interest – The Board also determined that the guards' role in labour disputes involving other bargaining unit members would not create a conflict of interest – A majority of the Board found, however, that the officers' (admittedly rare) role in investigating the conduct of other bargaining unit members, the relative lack of oversight of their investigations, and the seriousness of possible consequences of such investigations were sufficient to establish a potential conflict of interest – Application dismissed

CITY OF TORONTO; RE THE CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 79; RE TORONTO CIVIC EMPLOYEES' UNION, LOCAL 416.....(Nov/Dec) 960

Certification – Bargaining Unit – The City objected to an application for certification brought by CUPE Local 79 for a bargaining unit of security guards, arguing that a conflict of interest would result because the Local already represents numerous other of the City's employees – The Board considered the various categories of guards employed by the City and the history of their employment responsibilities with the City (post-amalgamation), and concluded that their main roles are to assist members of the public by giving directions or providing information, and to protect City property from outside threats; the security officers do not engage in monitoring of other employees to cause a conflict of interest – The Board also determined that the guards' role in labour disputes involving other bargaining unit members would not create a conflict of interest – A majority of the Board found, however, that the officers' (admittedly rare) role in investigating the conduct of other bargaining unit members, the relative lack of oversight of their investigations, and the seriousness of possible consequences of such investigations were sufficient to establish a potential conflict of interest – Application dismissed

CITY OF TORONTO; RE THE CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 79; RE TORONTO CIVIC EMPLOYEES' UNION, LOCAL 416.....(Nov/Dec) 960

Certification – Construction Industry – Intervention – Reconsideration – CLAC was successful in an application for certification and an interim certificate for non-ICI bargaining rights in Board Area 29 was issued, pending the final resolution of the composition of the bargaining unit – LIUNA sought to intervene and request a reconsideration of the interim certificate, arguing that it had an earlier outstanding application before the Board for province-wide ICI representation and non-ICI rights in Board areas 15 and 31, whose outcome may affect the disposition of the CLAC application – The Board denied the intervention, finding that LIUNA had proper and timely notice of CLAC's application and failed to act on it within the time prescribed – The Board equally rejected the request for reconsideration, having found that the non-ICI employees of the employer working in Board area 29 could not be affected by the outcome of the earlier LIUNA application – Where disputes over one or more dimensions of the bargaining unit description cannot affect a trade union's entitlement to certification, s. 9(2) of the Act allows the union to begin to represent in collective bargaining those employees in the unit over whom there is no dispute – Intervention and reconsideration dismissed

DALCON ENTERPRISES INC.; RE CHRISTIAN LABOUR ASSOCIATION OF CANADA; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Nov/Dec) 1040

Certification Construction Industry – Termination The applicant sought certification pursuant to section 128.1 to represent the employer's bricklayers working on non-ICI projects The employer was already bound to a collective agreement in the ICI sector with the applicant union – In early 2012, the employer entered into a collective agreement with the intervenor union with respect to non-ICI work – The applicant also sought to terminate the bargaining rights of the intervenor with the employer, pursuant to section 66 of the Act – The intervenor and the employer attempted to justify their voluntary collective agreement in three ways, none of which were persuasive to the Board – The Board did not accept that this was a valid "pre-hire" collective agreement, as the rationale behind such agreements is the employee's choice of bargaining agent and in the case at hand there was no such choice exercised by the employees to be represented by the intervenor – The Board did not accept that subsection 1(4) had any application to the operations of the employer – Finally, the fact that the employer was required to enter into a collective agreement with the intervenor in order to work on a non-ICI project did

not render that collective agreement valid – The Board found that the institutional rights of the intervenor could not override the employees' statutory rights to choose their own bargaining agent – The Board exercised its discretion under section 66 of the Act to declare the collective agreement between the intervenor and the employer invalid – Termination application granted – Application for certification continues

BMC MASONRY, A DIVISION OF 2032686 ONTARIO LIMITED; RE BRICK AND ALLIED CRAFT UNION OF CANADA, RE LOCAL 2; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 .....(Nov/Dec) 952

Certification – Evidence – Practice and Procedure – Unfair Labour Practice – The Board directed the union to identify the employees that it alleged had been threatened or intimidated by the employer – The Board distinguished *Hillside Sod Ltd.*, where the Board declined to order the union to identify persons to whom impugned statements had been made, holding that their identity was not essential for the applicant union to prepare its case – In the present application, since the reverse onus provision in s. 96(5) applied to the employer, the only defence it would be able to mount would be a blanket denial of the statements made; any positive defence could only be made after the employer's witness testified in chief and the employer learned the names of the allegedly threatened employees in the union's cross-examination of the employer's witness – Matter continues

IMPERIAL CHILLED JUICE INC.; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175.....(Nov/Dec) 1104

Certification – Bargaining Unit – Construction Industry – LIUNA brought two applications to be certified as the bargaining agent for all construction labourers working for the employer in all non-ICI sectors in Board areas 26 and 27 – The Board found that three employees performed the work of construction labourers on the application date in both Board areas – The employer argued that those workers should be included in both bargaining units for the purpose of the two certification applications – LIUNA argued that those workers should only be included in one bargaining unit for the Board area in which they spent the "majority of time" on the application date - The Board rejected as impractical the application of the "majority of time test" in order to determine to which Board area bargaining unit an employee belonged on the application date – The Board also rejected the union's submission that an employee cannot belong to more than one bargaining unit in different geographical locations on the application date (although it did maintain that an employee can only belong to one *craft* bargaining unit in a particular geographic location on the application date) – If an employee works for an employer and performs, for a majority of time on the application date, the tasks associated with the applicant's craft unit in the geographic area covered by the application for certification, that employee is in the bargaining unit regardless of what else he or she may do outside the bargaining unit for the employer or anyone else – Accordingly, the Board found that the three workers who performed construction labourer's work in both Board areas on the application date were bargaining unit employees for the purpose of both applications – The Board area 27 application was dismissed since LIUNA filed membership information for less than 40% of the bargaining unit – The Board certified LIUNA for Board area 26, as more than 55% of the workers in the bargaining unit were members of constituent locals of the applicant at the time the application was filed – One application dismissed; the other granted

COUNTRY GREEN HOMES INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL....(Nov/Dec) 979

Construction Industry – Bargaining Unit – Certification – LIUNA brought two applications to be certified as the bargaining agent for all construction labourers working for the employer in all non-ICI sectors in Board areas 26 and 27 – The Board found that three employees performed the work of construction labourers on the application date in both Board areas – The employer argued that those workers should be included in both bargaining units for the purpose of the two certification applications – LIUNA argued that those workers should only be included in one bargaining unit for the Board area in which they spent the "majority of time" on the application date - The Board rejected as impractical the application of the "majority of time test" in order to determine to which Board area bargaining unit an employee belonged on the application date – The Board also rejected the union's submission that an employee cannot belong to more than one bargaining unit in different geographical locations on the application date (although it did maintain that an employee can only belong to one *craft* bargaining unit in a particular geographic location on the application date) – If an employee works for an employer and performs, for a majority of time on the application date, the tasks associated with the applicant's craft unit in the geographic area covered by the application for certification, that employee is in the bargaining unit regardless of what else he or she may do outside the bargaining unit for the employer or anyone else – Accordingly, the Board found that the three workers who performed construction labourer's work in both Board areas on the application date were bargaining unit employees for the purpose of both applications – The Board area 27 application was dismissed since LIUNA filed membership information for less than 40% of the bargaining unit – The Board certified LIUNA for Board area 26, as more than 55% of the workers in the bargaining unit were members of constituent locals of the applicant at the time the application was filed – One application dismissed; the other granted

COUNTRY GREEN HOMES INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL....(Nov/Dec) 979

Construction Industry Certification Termination – The applicant sought certification pursuant to section 128.1 to represent the employer's bricklayers working on non-ICI projects – The employer was already bound to a collective agreement in the ICI sector with the applicant union – In early 2012, the employer entered into a collective agreement with the intervenor union with respect to non-ICI work – The applicant also sought to terminate the bargaining rights of the intervenor with the employer, pursuant to section 66 of the Act – The intervenor and the employer attempted to justify their voluntary collective agreement in three ways, none of which were persuasive to the Board – The Board did not accept that this was a valid "pre-hire" collective agreement, as the rationale behind such agreements is the employee's choice of bargaining agent and in the case at hand there was no such choice exercised by the employees to be represented by the intervenor – The Board did not accept that subsection 1(4) had any application to the operations of the employer – Finally, the fact that the employer was required to enter into a collective agreement with the intervenor in order to work on a non-ICI project did not render that collective agreement valid – The Board found that the institutional rights of the intervenor could not override the employees' statutory rights to choose their own bargaining agent – The Board exercised its discretion under section 66 of the Act to declare the collective agreement between the intervenor and the employer invalid Termination application granted – Application for certification continues

BMC MASONRY, A DIVISION OF 2032686 ONTARIO LIMITED; RE BRICK AND ALLIED CRAFT UNION OF CANADA, RE LOCAL 2; RE UNIVERSAL WORKERS

UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 .....(Nov/Dec) 952

Construction Industry – Employee – Final Offer Vote – The Board was asked to determine who are the "employees in the affected bargaining unit" when the Minister directs a vote of an employer's last offer in the construction industry – Absent a direction from the Minister ("on the terms that he or she considers necessary"), the Board found no reason not to apply its clear, well-known, longstanding and well-established rule for representation questions: to be eligible to vote an employee must be at work in the bargaining unit on the date of application – No Labourers were at work; submissions directed with respect to four Operating Engineers – Matters continue

EKUM–SEKUM INCORPORATED O/A BRANTCO CONSTRUCTION; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL ON BEHALF OF LOCALS 1059, 837 AND 1081 .....(Nov/Dec) 1048

Construction Industry – Certification – Intervention – Reconsideration – CLAC was successful in an application for certification and an interim certificate for non-ICI bargaining rights in Board Area 29 was issued, pending the final resolution of the composition of the bargaining unit – LIUNA sought to intervene and request a reconsideration of the interim certificate, arguing that it had an earlier outstanding application before the Board for province-wide ICI representation and non-ICI rights in Board areas 15 and 31, whose outcome may affect the disposition of the CLAC application – The Board denied the intervention, finding that LIUNA had proper and timely notice of CLAC's application and failed to act on it within the time prescribed – The Board equally rejected the request for reconsideration, having found that the non-ICI employees of the employer working in Board area 29 could not be affected by the outcome of the earlier LIUNA application – Where disputes over one or more dimensions of the bargaining unit description cannot affect a trade union's entitlement to certification, s. 9(2) of the Act allows the union to begin to represent in collective bargaining those employees in the unit over whom there is no dispute – Intervention and reconsideration dismissed

DALCON ENTERPRISES INC.; RE CHRISTIAN LABOUR ASSOCIATION OF CANADA; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL... .....(Nov/Dec) 1040

Construction Industry Grievance – Damages – In considering these grievances in the wake of a sector determination which found that Avery had incorrectly assigned work under Civil, rather than ICI Agreements, the Board held that, unlike in a jurisdictional dispute, Avery was not faced with irreconcilable obligations to two or more different unions (where damages would usually not be awarded); the damages here were owed to individual members of one union who performed work under the Civil Agreement rather than the ICI agreement, for lower compensation – Damages found owing; their calculation was remitted to the parties

AVERY CONSTRUCTION LIMITED; RE IUOE, LOCAL 793; RE OPERATING ENGINEERS EMPLOYERS BARGAINING AGENCY; RE LIUNA, LOCAL 1036; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE PROVINCIAL EMPLOYER BARGAINING AGENCY – LABOURERS.....(Nov/Dec) 943

Construction Industry Grievance – Evidence – Practice and Procedure – On a layoff/discharge grievance, the union made a preliminary objection to the admissibility of video surveillance evidence, and requested that the Board determine whether the test was "reasonableness" or "relevance" – The Board noted the video surveillance evidence was of core probative relevance and was conducted on company premises during working hours – The Board was attracted to the approach that permitted the admissibility of the video surveillance evidence, but also contemplated submissions concerning any alleged improper employer conduct, after the Board has a full appreciation of the entire dispute between the parties – Evidence admitted – Matter continues

ELLIS DON LTD.; LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506.....(Nov/Dec) 1058

Construction Industry Grievance – The union grieved Hydro One's refusal to re-hire a journeyman electrician based on the worker's inability to communicate sufficiently in English – The Board held that management decisions to hire a worker (or not) that are based upon safety considerations including concerns about the ability of employees to communicate and understand instructions should be given deference, and held to a reasonableness standard – In this instance, the worker had previously worked (briefly) for Hydro One; when the interviewer determined that the worker was having difficulty understanding questions put to him, he contacted a manager who had been responsible for the employee's previous work area – The interviewer failed, however, to take further steps to inquire about the employee's earlier experience at Hydro, including his training experience or the impressions of others who had worked with him – The Board concluded that the employer had acted arbitrarily in failing to consider relevant information readily available to it – The Board did not order Hydro to hire or compensate the worker, however, because the union was unable to persuade the Board that, had Hydro made the appropriate inquiries, it would not have been unreasonable for Hydro to continue to have serious concerns about the worker's ability to understand instructions and communicate safely in the workplace – Grievance allowed; no damages awarded

HYDRO ONE INC.; RE CANADIAN UNION OF SKILLED WORKERS.....(Nov/Dec) 1098

Damages - Construction Industry Grievance – In considering these grievances in the wake of a sector determination which found that Avery had incorrectly assigned work under Civil, rather than ICI Agreements, the Board held that, unlike in a jurisdictional dispute, Avery was not faced with irreconcilable obligations to two or more different unions (where damages would usually not be awarded); the damages here were owed to individual members of one union who performed work under the Civil Agreement rather than the ICI agreement, for lower compensation – Damages found owing; their calculation was remitted to the parties

AVERY CONSTRUCTION LIMITED; RE IUOE, LOCAL 793; RE OPERATING ENGINEERS EMPLOYERS BARGAINING AGENCY; RE LIUNA, LOCAL 1036; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE PROVINCIAL EMPLOYER BARGAINING AGENCY – LABOURERS.....(Nov/Dec) 943

Education Act – Parties – *Prima Facie* Motion – Unfair Labour Practice – OSSTF brought a complaint against the Crown and Ministers of the Crown (including in their personal capacities) concerning the government issuance of a document for use at the Provincial Discussion Table (PDT), setting out the collective agreement results the government wished in the educational sector, including wage and grid freezes and changes to the ability to bank and cash out sick leave credits on retirement – The complaint alleged that the government's actions in making public statements with respect to its PDT positions

constituted a failure to bargain in good faith and other breaches of the Act – The government took the position that the Crown was not bound by the Act (Crown immunity), the issues were not justiciable, and there was no *prima facie* case – The Board closely followed an earlier decision in *Ontario (Premier)* and dismissed the complaint pursuant to s. 4(2) of the Act, finding the Act does not bind the Crown and there was no point to any evidentiary hearing – Again following *Ontario (Premier)*, the Board did not find the government's role in the PDT process and in its efforts to build consensus or secure acquiescence on its political agenda to be a justiciable issue – Finally, the facts as alleged did not make out a case: the Crown was not the employer; the district school boards were – Nor was there anything pled to form the basis to conclude that the Crown was acting at the behest of the district school boards (assuming this to be possible given Crown immunity) – Application dismissed

CROWN IN RIGHT OF ONTARIO, THE HONOURABLE MR. DALTON MCGUINTY, PREMIER OF ONTARIO; THE HONOURABLE MS. LAUREL BROTEN, MINISTER OF EDUCATION; THE HONOURABLE MR. DWIGHT DUNCAN, MINISTER OF FINANCE; DALTON MCGUINTY IN HIS PERSONAL CAPACITY; LAUREL BROTEN IN HER PERSONAL CAPACITY AND DWIGHT DUNCAN IN HIS PERSONAL CAPACITY; ELEMENTARY TEACHERS' FEDERATION OF ONTARIO, ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION, ONTARIO CATHOLIC SCHOOL TRUSTEES' ASSOCIATION AND CANADIAN UNION OF PUBLIC EMPLOYEES .....(Nov/Dec) 1007

Employee – Construction Industry – Final Offer Vote – The Board was asked to determine who are the "employees in the affected bargaining unit" when the Minister directs a vote of an employer's last offer in the construction industry – Absent a direction from the Minister ("on the terms that he or she considers necessary"), the Board found no reason not to apply its clear, well-known, longstanding and well-established rule for representation questions: to be eligible to vote an employee must be at work in the bargaining unit on the date of application – No Labourers were at work; submissions directed with respect to four Operating Engineers – Matters continue

EKUM-SEKUM INCORPORATED O/A BRANTCO CONSTRUCTION; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL ON BEHALF OF LOCALS 1059, 837 AND 1081 .....(Nov/Dec) 1048

Employer Support – Evidence – Practice and Procedure – Termination – The union sought dismissal of the termination application alleging employer support – Two and one-half years after the application was filed and after almost all the evidence was entered, the union sought leave to recall B, one of the two employees who cast ballots in the vote, to testify in support of its 63(16) allegations, given new information B provided to union representatives – This information included alleged statements to B by the employer's manager that B had to join the union as a first step to filing an application to terminate the union's bargaining rights – The Board did not exercise its discretion to permit proposed amendments to the union's pleadings, given the failure of the union to exercise due diligence (it made no serious attempt to initially speak with B), the significant prejudice (fading of memories, death of the owner, litigation strategy) caused by this request, and the fact that the proceedings would be considerably lengthened since most witnesses would have to be recalled – The Board also held it would not permit the union to recall B

since it seeks to recall a witness for the purpose of leading evidence concerning entirely new allegations of misconduct raised for the first time at the eleventh hour in circumstances where it failed to take any steps prior to the hearing to uncover those facts – This was not a situation where a party received material information it could not reasonably have been aware of through the exercise of due diligence – Matter continues

AON BUILDERS INC.; MICHAEL MITCHELL; UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Nov/Dec) 929

Evidence – Certification – Practice and Procedure – Unfair Labour Practice – The Board directed the union to identify the employees that it alleged had been threatened or intimidated by the employer – The Board distinguished *Hillside Sod Ltd.*, where the Board declined to order the union to identify persons to whom impugned statements had been made, holding that their identity was not essential for the applicant union to prepare its case – In the present application, since the reverse onus provision in s. 96(5) applied to the employer, the only defence it would be able to mount would be a blanket denial of the statements made; any positive defence could only be made after the employer's witness testified in chief and the employer learned the names of the allegedly threatened employees in the union's cross-examination of the employer's witness – Matter continues

IMPERIAL CHILLED JUICE INC.; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175.....(Nov/Dec) 1104

Evidence – Construction Industry Grievance – Practice and Procedure – On a layoff/discharge grievance, the union made a preliminary objection to the admissibility of video surveillance evidence, and requested that the Board determine whether the test was "reasonableness" or "relevance" – The Board noted the video surveillance evidence was of core probative relevance and was conducted on company premises during working hours – The Board was attracted to the approach that permitted the admissibility of the video surveillance evidence, but also contemplated submissions concerning any alleged improper employer conduct, after the Board has a full appreciation of the entire dispute between the parties – Evidence admitted – Matter continues

ELLIS DON LTD.; LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506.....(Nov/Dec) 1058

Evidence – Employer Support – Practice and Procedure – Termination – The union sought dismissal of the termination application alleging employer support – Two and one-half years after the application was filed and after almost all the evidence was entered, the union sought leave to recall B, one of the two employees who cast ballots in the vote, to testify in support of its 63(16) allegations, given new information B provided to union representatives – This information included alleged statements to B by the employer's manager that B had to join the union as a first step to filing an application to terminate the union's bargaining rights – The Board did not exercise its discretion to permit proposed amendments to the union's pleadings, given the failure of the union to exercise due diligence (it made no serious attempt to initially speak with B), the significant prejudice (fading of memories, death of the owner, litigation strategy) caused by this request, and the fact that the proceedings would be considerably lengthened since most witnesses would have to be recalled – The Board also held it would not permit the union to recall B since it seeks to recall a witness for the purpose of leading evidence concerning entirely new allegations of misconduct raised for the first time at the eleventh hour in

circumstances where it failed to take any steps prior to the hearing to uncover those facts – This was not a situation where a party received material information it could not reasonably have been aware of through the exercise of due diligence – Matter continues

AON BUILDERS INC.; MICHAEL MITCHELL; UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Nov/Dec) 929

Final Offer Vote – Construction Industry – Employee –The Board was asked to determine who are the "employees in the affected bargaining unit" when the Minister directs a vote of an employer's last offer in the construction industry – Absent a direction from the Minister ("on the terms that he or she considers necessary"), the Board found no reason not to apply its clear, well-known, longstanding and well-established rule for representation questions: to be eligible to vote an employee must be at work in the bargaining unit on the date of application – No Labourers were at work; submissions directed with respect to four Operating Engineers – Matters continue

EKUM–SEKUM INCORPORATED O/A BRANTCO CONSTRUCTION; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL ON BEHALF OF LOCALS 1059, 837 AND 1081 .....(Nov/Dec) 1048

Health and Safety – Reprisal – Work Refusal – Correctional Officers continued to stage a work refusal after being advised by the Inspector that they did not have the right to refuse work – The circumstances of the dispute involved an outside call to the jail that a "zap-gun" (a "zip-gun" is a "home-made" weapon) was in the jail – In the end the management at the jail decided to implement a Level 2 search, while the correctional officers believed a Level 4 search was necessary – The union argued there was no work refusal, that neither the employer nor the inspector followed the requirements outlined in s. 43 and as a result the order could not stand – The Board first stated it was satisfied that a work refusal was engaged in when the manager was advised by one of the CO's that "we are shutting her down," and they stopped doing their rounds – The Board then noted that the main issue was whether the Inspector was correct in his decision that s. 43 did not apply in these circumstances – The Board reviewed the prior case law on the exemptions noting that the exemptions are important for the maintenance of the public's health and safety and for the health and safety of inmates housed in correctional facilities – The Board noted that none of the cases discuss the reasons for the exemptions in any detail, but that those exempted workers (firefighters, police officers, correctional officers) are charged with the protection of others and their jobs are inherently dangerous – If they refuse work, they are putting lives at risk – After reviewing the circumstances of home made jail weapons, the Board found that carrying out searches in inmate living areas and cells with the possibility that there might be a homemade weapon, including a homemade "gun," is a normal part of the correctional officer's job, as long as the searches have the appropriate equipment – The circumstances that existed at the jail at that time were inherent to the correctional officers' work – Accordingly, the appeal of the inspector's order was dismissed – Remaining matters referred to the parties

HAMILTON-WENTWORTH DETENTION CENTRE; CHRIS DOWLING; STEVE SMITH, DOUG KARIAM, INSPECTOR.....(Nov/Dec) 1071

Interim Relief – Unfair Labour Practice – CLAC sought the reinstatement of the most senior part-time housekeeping employee and organizer of its campaign, arguing that the discharge had detrimentally affected its organizing efforts – The Board considered its earlier jurisprudence under the irreparable harm aspect of the interim relief provisions, finding that the Board had examined the "pace" of card collecting, the impact the discharge of a key organizer might have on employees' choices in a representation vote and evidence of employees' hesitance to "cooperate with and assist the union" in its interim relief litigation – The Board was satisfied that CLAC had provided evidence of all of these elements, and had established that the employer's declarations left enough unanswered questions about its knowledge of the union's campaign that it was reasonable for the Board to infer a causal connection between the discharge and the campaign – Reinstatement ordered

HALDIMAND WAR MEMORIAL HOSPITAL; RE GRAND RIVER VALLEY HEALTH CARE EMPLOYEES UNION, LOCAL 305 AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA .....(Nov/Dec) 1061

Intervention – Certification – Construction Industry – Reconsideration – CLAC was successful in an application for certification and an interim certificate for non-ICI bargaining rights in Board Area 29 was issued, pending the final resolution of the composition of the bargaining unit – LIUNA sought to intervene and request a reconsideration of the interim certificate, arguing that it had an earlier outstanding application before the Board for province-wide ICI representation and non-ICI rights in Board areas 15 and 31, whose outcome may affect the disposition of the CLAC application – The Board denied the intervention, finding that LIUNA had proper and timely notice of CLAC's application and failed to act on it within the time prescribed – The Board equally rejected the request for reconsideration, having found that the non-ICI employees of the employer working in Board area 29 could not be affected by the outcome of the earlier LIUNA application – Where disputes over one or more dimensions of the bargaining unit description cannot affect a trade union's entitlement to certification, s. 9(2) of the Act allows the union to begin to represent in collective bargaining those employees in the unit over whom there is no dispute – Intervention and reconsideration dismissed

DALCON ENTERPRISES INC.; RE CHRISTIAN LABOUR ASSOCIATION OF CANADA; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL. .....(Nov/Dec) 1040

Judicial Review – Non-Construction Employer – The Court of Appeal dismissed an appeal of a Divisional Court decision upholding the Board's decision that found that Greater Essex continued to be a construction industry employer as long as it performed construction work for an unrelated person from whom it expected compensation

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773; RE THE INTERNATIONAL UNIONS OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 6; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE THE INTERNATIONAL UNIONS OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LABOURERS' INTERNATIONAL UNIONS OF NORTH AMERICA, LOCAL 625; RE ONTARIO LABOUR RELATIONS BOARD.... 1127

Non-Construction Employer – Judicial Review – The Court of Appeal dismissed an appeal of a Divisional Court decision upholding the Board's decision that found that Greater Essex continued to be a construction industry employer as long as it performed construction work for an unrelated person from whom it expected compensation

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773; RE THE INTERNATIONAL UNIONS OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 6; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE THE INTERNATIONAL UNIONS OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LABOURERS' INTERNATIONAL UNIONS OF NORTH AMERICA, LOCAL 625; RE ONTARIO LABOUR RELATIONS BOARD.. 1127

Parties – *Education Act* – *Prima Facie* motion – Unfair Labour Practice – OSSTF brought a complaint against the Crown and Ministers of the Crown (including in their personal capacities) concerning the government issuance of a document for use at the Provincial Discussion Table (PDT), setting out the collective agreement results the government wished in the educational sector, including wage and grid freezes and changes to the ability to bank and cash out sick leave credits on retirement – The complaint alleged that the government's actions in making public statements with respect to its PDT positions constituted a failure to bargain in good faith and other breaches of the Act – The government took the position that the Crown was not bound by the Act (Crown immunity), the issues were not justiciable, and there was no *prima facie* case – The Board closely followed an earlier decision in *Ontario (Premier)* and dismissed the complaint pursuant to s. 4(2) of the Act, finding the Act does not bind the Crown and there was no point to any evidentiary hearing – Again following *Ontario (Premier)*, the Board did not find the government's role in the PDT process and in its efforts to build consensus or secure acquiescence on its political agenda to be a justiciable issue – Finally, the facts as alleged did not make out a case: the Crown was not the employer; the district school boards were – Nor was there anything pled to form the basis to conclude that the Crown was acting at the behest of the district school boards (assuming this to be possible given Crown immunity) – Application dismissed

CROWN IN RIGHT OF ONTARIO, THE HONOURABLE MR. DALTON MCGUINTY, PREMIER OF ONTARIO; THE HONOURABLE MS. LAUREL BROTEN, MINISTER OF EDUCATION; THE HONOURABLE MR. DWIGHT DUNCAN, MINISTER OF FINANCE; DALTON MCGUINTY IN HIS PERSONAL CAPACITY; LAUREL BROTEN IN HER PERSONAL CAPACITY AND DWIGHT DUNCAN IN HIS PERSONAL CAPACITY; ELEMENTARY TEACHERS' FEDERATION OF ONTARIO, ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION, ONTARIO CATHOLIC SCHOOL TRUSTEES' ASSOCIATION AND CANADIAN UNION OF PUBLIC EMPLOYEES .....(Nov/Dec) 1007

Practice and Procedure – Abandonment – Unfair Labour Practice – The Board found it reasonable to infer from the fact that the applicant did nothing to advance this application for a period of four years and five months that the application was, at some point during such period of inactivity, abandoned by the applicant – Application dismissed

ARTHUR COELHO & SONS MASONRY; MASONRY INDUSTRY EMPLOYERS' COUNCIL OF ONTARIO AND OTTAWA REGION MASONRY CONTRACTORS ASSOCIATION; INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED

CRAFTSMEN, LOCAL 7 ARTHUR COELHO O/A OTTAWA MASONRY, 6468721 CANADA, INC. O/A CDO MASONRY, AND M.A.C. MACONNERIE MASONRY.... 940

Practice and Procedure – Certification – Evidence - Unfair Labour Practice - The Board directed the union to identify the employees that it alleged had been threatened or intimidated by the employer – The Board distinguished *Hillside Sod Ltd.*, where the Board declined to order the union to identify persons to whom impugned statements had been made, holding that their identity was not essential for the applicant union to prepare its case – In the present application, since the reverse onus provision in s. 96(5) applied to the employer, the only defence it would be able to mount would be a blanket denial of the statements made; any positive defence could only be made after the employer's witness testified in chief and the employer learned the names of the allegedly threatened employees in the union's cross-examination of the employer's witness – Matter continues

IMPERIAL CHILLED JUICE INC.; RE-UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175.....(Nov/Dec) 1104

Practice and Procedure – Employer Support – Evidence – Termination – The union sought dismissal of the termination application alleging employer support – Two and one-half years after the application was filed and after almost all the evidence was entered, the union sought leave to recall B, one of the two employees who cast ballots in the vote, to testify in support of its 63(16) allegations, given new information B provided to union representatives – This information included alleged statements to B by the employer's manager that B had to join the union as a first step to filing an application to terminate the union's bargaining rights – The Board did not exercise its discretion to permit proposed amendments to the union's pleadings, given the failure of the union to exercise due diligence (it made no serious attempt to initially speak with B), the significant prejudice (fading of memories, death of the owner, litigation strategy) caused by this request, and the fact that the proceedings would be considerably lengthened since most witnesses would have to be recalled – The Board also held it would not permit the union to recall B since it seeks to recall a witness for the purpose of leading evidence concerning entirely new allegations of misconduct raised for the first time at the eleventh hour in circumstances where it failed to take any steps prior to the hearing to uncover those facts – This was not a situation where a party received material information it could not reasonably have been aware of through the exercise of due diligence – Matter continues

AON BUILDERS INC.; MICHAEL MITCHELL; UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Nov/Dec) 929

Practice and Procedure – Construction Industry Grievance – Evidence – On a layoff/discharge grievance, the union made a preliminary objection to the admissibility of video surveillance evidence, and requested that the Board determine whether the test was "reasonableness" or "relevance" – The Board noted the video surveillance evidence was of core probative relevance and was conducted on company premises during working hours – The Board was attracted to the approach that permitted the admissibility of the video surveillance evidence, but also contemplated submissions concerning any alleged improper employer conduct, after the Board has a full appreciation of the entire dispute between the parties – Evidence admitted – Matter continues

ELLIS DON LTD.; LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506.....(Nov/Dec) 1058

Prima Facie Motion – Related Employer – ATU Locals 113 and 1587 commenced legal strikes against York BRT, Miller and First Student, all of whom were in contractual relations to provide transportation services to York Region – Renewal collective agreements were ratified with York BRT and Miller; the contract with First Student was cancelled – The Locals brought unfair labour practice complaints against all responding parties, as well as a related employer application involving York Region and York BRT – The responding parties brought a motion to dismiss the related employer allegation, arguing the Board would not grant the orders or remedies requested even if all the facts alleged were assumed to be true – The Locals submitted that York Region was the "ghost in the room" because of the control it exercises over the transportation suppliers; in effect, the Locals were seeking an "upstream" declaration that would extend the bargaining rights they had achieved with a subcontractor to the principal with which the subcontractor has a commercial relationship – The unions argued that any contract negotiation with the suppliers was frustrated because of the absence at the table of the "entity with the real economic power" – The Board considered the longstanding relationship among the parties, the repeated renewals of collective agreements (including the most recent agreements), existing jurisprudence, and the distinction between "bargaining rights" and "bargaining power," and granted the *prima facie* motion to dismiss the related employer application without a hearing – Application dismissed

THE REGIONAL MUNICIPALITY OF YORK; RE AMALGAMATED TRANSIT UNION, LOCAL 113; RE YORK BRT SERVICES L.P; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 1587 ..... (Nov/Dec) 1115

Prima Facie Motion – *Education Act* – Parties – Unfair Labour Practice – OSSTF brought a complaint against the Crown and Ministers of the Crown (including in their personal capacities) concerning the government issuance of a document for use at the Provincial Discussion Table (PDT), setting out the collective agreement results the government wished in the educational sector, including wage and grid freezes and changes to the ability to bank and cash out sick leave credits on retirement – The complaint alleged that the government's actions in making public statements with respect to its PDT positions constituted a failure to bargain in good faith and other breaches of the Act – The government took the position that the Crown was not bound by the Act (Crown immunity), the issues were not justiciable, and there was no *prima facie* case – The Board closely followed an earlier decision in *Ontario (Premier)* and dismissed the complaint pursuant to s. 4(2) of the Act, finding the Act does not bind the Crown and there was no point to any evidentiary hearing – Again following *Ontario (Premier)*, the Board did not find the government's role in the PDT process and in its efforts to build consensus or secure acquiescence on its political agenda to be a justiciable issue – Finally, the facts as alleged did not make out a case: the Crown was not the employer; the district school boards were – Nor was there anything pled to form the basis to conclude that the Crown was acting at the behest of the district school boards (assuming this to be possible given Crown immunity) – Application dismissed

CROWN IN RIGHT OF ONTARIO, THE HONOURABLE MR. DALTON MCGUINTY, PREMIER OF ONTARIO; THE HONOURABLE MS. LAUREL BROTEN, MINISTER OF EDUCATION; THE HONOURABLE MR. DWIGHT DUNCAN, MINISTER OF FINANCE; DALTON MCGUINTY IN HIS PERSONAL CAPACITY; LAUREL BROTEN IN HER PERSONAL CAPACITY AND DWIGHT DUNCAN IN HIS PERSONAL CAPACITY; ELEMENTARY TEACHERS' FEDERATION OF ONTARIO, ONTARIO PUBLIC SCHOOL BOARDS'

ASSOCIATION, ONTARIO CATHOLIC SCHOOL TRUSTEES' ASSOCIATION AND CANADIAN UNION OF PUBLIC EMPLOYEES .....(Nov/Dec) 1007

Reconsideration – Certification – Construction Industry – Intervention –CLAC was successful in an application for certification and an interim certificate for non-ICI bargaining rights in Board Area 29 was issued, pending the final resolution of the composition of the bargaining unit – LIUNA sought to intervene and request a reconsideration of the interim certificate, arguing that it had an earlier outstanding application before the Board for province-wide ICI representation and non-ICI rights in Board areas 15 and 31, whose outcome may affect the disposition of the CLAC application – The Board denied the intervention, finding that LIUNA had proper and timely notice of CLAC's application and failed to act on it within the time prescribed – The Board equally rejected the request for reconsideration, having found that the non-ICI employees of the employer working in Board area 29 could not be affected by the outcome of the earlier LIUNA application – Where disputes over one or more dimensions of the bargaining unit description cannot affect a trade union's entitlement to certification, s. 9(2) of the Act allows the union to begin to represent in collective bargaining those employees in the unit over whom there is no dispute – Intervention and reconsideration dismissed

DALCON ENTERPRISES INC.; RE CHRISTIAN LABOUR ASSOCIATION OF CANADA; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL .....(Nov/Dec) 1040

Related Employer – *Prima Facie* Motion – ATU Locals 113 and 1587 commenced legal strikes against York BRT, Miller and First Student, all of whom were in contractual relations to provide transportation services to York Region – Renewal collective agreements were ratified with York BRT and Miller; the contract with First Student was cancelled – The Locals brought unfair labour practice complaints against all responding parties, as well as a related employer application involving York Region and York BRT – The responding parties brought a motion to dismiss the related employer allegation, arguing the Board would not grant the orders or remedies requested even if all the facts alleged were assumed to be true – The Locals submitted that York Region was the "ghost in the room" because of the control it exercises over the transportation suppliers; in effect, the Locals were seeking an "upstream" declaration that would extend the bargaining rights they had achieved with a subcontractor to the principal with which the subcontractor has a commercial relationship – The unions argued that any contract negotiation with the suppliers was frustrated because of the absence at the table of the "entity with the real economic power" – The Board considered the longstanding relationship among the parties, the repeated renewals of collective agreements (including the most recent agreements), existing jurisprudence, and the distinction between "bargaining rights" and "bargaining power," and granted the *prima facie* motion to dismiss the related employer application without a hearing – Application dismissed

THE REGIONAL MUNICIPALITY OF YORK; RE AMALGAMATED TRANSIT UNION, LOCAL 113; RE YORK BRT SERVICES L.P; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 1587; .....(Nov/Dec) 1115

Reprisal – Health and Safety – Work Refusal – Correctional Officers continued to stage a work refusal after being advised by the Inspector that they did not have the right to refuse work – The circumstances of the dispute involved an outside call to the jail that a "zap-gun" (a "zip-gun" is a "home-made" weapon) was in the jail – In the end the management at the jail decided to implement a Level 2 search, while the correctional officers believed a

Level 4 search was necessary – The union argued there was no work refusal, that neither the employer nor the inspector followed the requirements outlined in s. 43 and as a result the order could not stand – The Board first stated it was satisfied that a work refusal was engaged in when the manager was advised by one of the CO's that "we are shutting her down," and they stopped doing their rounds – The Board then noted that the main issue was whether the Inspector was correct in his decision that s. 43 did not apply in these circumstances – The Board reviewed the prior case law on the exemptions noting that the exemptions are important for the maintenance of the public's health and safety and for the health and safety of inmates housed in correctional facilities – The Board noted that none of the cases discuss the reasons for the exemptions in any detail, but that those exempted workers (firefighters, police officers, correctional officers) are charged with the protection of others and their jobs are inherently dangerous – If they refuse work, they are putting lives at risk – After reviewing the circumstances of home made jail weapons, the Board found that carrying out searches in inmate living areas and cells with the possibility that there might be a homemade weapon, including a homemade "gun," is a normal part of the correctional officer's job, as long as the searches have the appropriate equipment – The circumstances that existed at the jail at that time were inherent to the correctional officers' work – Accordingly, the appeal of the inspector's order was dismissed – Remaining matters referred to the parties

HAMILTON-WENTWORTH DETENTION CENTRE; CHRIS DOWLING; STEVE SMITH,; DOUG KARIAM, INSPECTOR.....(Nov/Dec) 1071

Termination Certification Construction Industry – The applicant sought certification pursuant to section 128.1 to represent the employer's bricklayers working on non-ICI projects The employer was already bound to a collective agreement in the ICI sector with the applicant union In early 2012, the employer entered into a collective agreement with the intervenor union with respect to non-ICI work – The applicant also sought to terminate the bargaining rights of the intervenor with the employer, pursuant to section 66 of the Act – The intervenor and the employer attempted to justify their voluntary collective agreement in three ways, none of which were persuasive to the Board – The Board did not accept that this was a valid "pre-hire" collective agreement, as the rationale behind such agreements is the employee's choice of bargaining agent and in the case at hand there was no such choice exercised by the employees to be represented by the intervenor – The Board did not accept that subsection 1(4) had any application to the operations of the employer – Finally, the fact that the employer was required to enter into a collective agreement with the intervenor in order to work on a non-ICI project did not render that collective agreement valid – The Board found that the institutional rights of the intervenor could not override the employees' statutory rights to choose their own bargaining agent – The Board exercised its discretion under section 66 of the Act to declare the collective agreement between the intervenor and the employer invalid – Termination application granted – Application for certification continues

BMC MASONRY, A DIVISION OF 2032686 ONTARIO LIMITED; RE BRICK AND ALLIED CRAFT UNION OF CANADA, RE LOCAL 2; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 .....(Nov/Dec) 952

Termination – Bargaining Rights – Voluntary Recognition – The Board was asked to rule on the validity of a voluntary recognition agreement entered into by the SEIU and SteriPro – The OWU applied to displace the SEIU in two bargaining units of employees at Humber River Regional Hospital – Before the Board issued its decisions certifying the OWU, the work of the bargaining units was transferred to SteriPro - The SEIU and SteriPro entered

into a VRA, relying on the contracting out provision in the original collective agreement between SEIU and the Hospital – The Board found that there was no need for evidence of employee support to make the VRA valid: it was sufficient that, at the time the parties entered into the VRA, the SEIU was the legitimate bargaining agent for the employees, with language in its collective agreement that gave it a legal right to continue in that role with a new employer – Application to terminate bargaining rights dismissed – Related matters continue

STERIPRO CANADA LIMITED PARTNERSHIP; RE ONTARIO WORKERS' UNION; RE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1 CANADA; RE HUMBER RIVER REGIONAL HOSPITAL.....(Nov/Dec) 1107

Termination – Employer Support – Evidence – Practice and Procedure – The union sought dismissal of the termination application alleging employer support – Two and one-half years after the application was filed and after almost all the evidence was entered, the union sought leave to recall B, one of the two employees who cast ballots in the vote, to testify in support of its 63(16) allegations, given new information B provided to union representatives – This information included alleged statements to B by the employer's manager that B had to join the union as a first step to filing an application to terminate the union's bargaining rights – The Board did not exercise its discretion to permit proposed amendments to the union's pleadings, given the failure of the union to exercise due diligence (it made no serious attempt to initially speak with B), the significant prejudice (fading of memories, death of the owner, litigation strategy) caused by this request, and the fact that the proceedings would be considerably lengthened since most witnesses would have to be recalled – The Board also held it would not permit the union to recall B since it seeks to recall a witness for the purpose of leading evidence concerning entirely new allegations of misconduct raised for the first time at the eleventh hour in circumstances where it failed to take any steps prior to the hearing to uncover those facts – This was not a situation where a party received material information it could not reasonably have been aware of through the exercise of due diligence – Matter continues

AON BUILDERS INC.; MICHAEL MITCHELL; UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Nov/Dec) 929

Unfair Labour Practice – Abandonment – Practice and Procedure – The Board found it reasonable to infer from the fact that the applicant did nothing to advance this application for a period of four years and five months that the application was, at some point during such period of inactivity, abandoned by the applicant – Application dismissed

ARTHUR COELHO & SONS MASONRY; MASONRY INDUSTRY EMPLOYERS' COUNCIL OF ONTARIO AND OTTAWA REGION MASONRY CONTRACTORS ASSOCIATION; INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 7 ARTHUR COELHO O/A OTTAWA MASONRY, 6468721 CANADA, INC. O/A CDO MASONRY, AND M.A.C. MACONNERIE MASONRY.....(Nov/Dec) 940

Unfair Labour Practice – Certification – Evidence – Practice and Procedure – The Board directed the union to identify the employees that it alleged had been threatened or intimidated by the employer – The Board distinguished *Hillside Sod Ltd.*, where the Board declined to order the union to identify persons to whom impugned statements had been made, holding that their identity was not essential for the applicant union to prepare

its case – In the present application, since the reverse onus provision in s. 96(5) applied to the employer, the only defence it would be able to mount would be a blanket denial of the statements made; any positive defence could only be made after the employer's witness testified in chief and the employer learned the names of the allegedly threatened employees in the union's cross-examination of the employer's witness – Matter continues

IMPERIAL CHILLED JUICE INC.; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175.....(Nov/Dec) 1104

Unfair Labour Practice – *Education Act* – Parties – *Prima Facie* Motion – OSSTF brought a complaint against the Crown and Ministers of the Crown (including in their personal capacities) concerning the government issuance of a document for use at the Provincial Discussion Table (PDT), setting out the collective agreement results the government wished in the educational sector, including wage and grid freezes and changes to the ability to bank and cash out sick leave credits on retirement – The complaint alleged that the government's actions in making public statements with respect to its PDT positions constituted a failure to bargain in good faith and other breaches of the Act – The government took the position that the Crown was not bound by the Act (Crown immunity), the issues were not justiciable, and there was no *prima facie* case – The Board closely followed an earlier decision in *Ontario (Premier)* and dismissed the complaint pursuant to s. 4(2) of the Act, finding the Act does not bind the Crown and there was no point to any evidentiary hearing – Again following *Ontario (Premier)*, the Board did not find the government's role in the PDT process and in its efforts to build consensus or secure acquiescence on its political agenda to be a justiciable issue – Finally, the facts as alleged did not make out a case: the Crown was not the employer; the district school boards were – Nor was there anything pled to form the basis to conclude that the Crown was acting at the behest of the district school boards (assuming this to be possible given Crown immunity) – Application dismissed

CROWN IN RIGHT OF ONTARIO, THE HONOURABLE MR. DALTON MCGUINTY, PREMIER OF ONTARIO; THE HONOURABLE MS. LAUREL BROTEN, MINISTER OF EDUCATION; THE HONOURABLE MR. DWIGHT DUNCAN, MINISTER OF FINANCE; DALTON MCGUINTY IN HIS PERSONAL CAPACITY; LAUREL BROTEN IN HER PERSONAL CAPACITY AND DWIGHT DUNCAN IN HIS PERSONAL CAPACITY; ELEMENTARY TEACHERS' FEDERATION OF ONTARIO, ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION, ONTARIO CATHOLIC SCHOOL TRUSTEES' ASSOCIATION AND CANADIAN UNION OF PUBLIC EMPLOYEES.....(Nov/Dec) 1007

Unfair Labour Practice – Interim Relief – CLAC sought the reinstatement of the most senior part-time housekeeping employee and organizer of its campaign, arguing that the discharge had detrimentally affected its organizing efforts – The Board considered its earlier jurisprudence under the irreparable harm aspect of the interim relief provisions, finding that the Board had examined the "pace" of card collecting, the impact the discharge of a key organizer might have on employees' choices in a representation vote and evidence of employees' hesitance to "cooperate with and assist the union" in its interim relief litigation – The Board was satisfied that CLAC had provided evidence of all of these elements, and had established that the employer's declarations left enough unanswered questions about its knowledge of the union's campaign that it was reasonable for the Board to infer a causal connection between the discharge and the campaign – Reinstatement ordered

HALDIMAND WAR MEMORIAL HOSPITAL; RE GRAND RIVER VALLEY HEALTH CARE EMPLOYEES UNION, LOCAL 305 AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA .....(Nov/Dec) 1061

Voluntary Recognition – Bargaining Rights – Termination – The Board was asked to rule on the validity of a voluntary recognition agreement entered into by the SEIU and SteriPro – The OWU applied to displace the SEIU in two bargaining units of employees at Humber River Regional Hospital – Before the Board issued its decisions certifying the OWU, the work of the bargaining units was transferred to SteriPro – The SEIU and SteriPro entered into a VRA, relying on the contracting out provision in the original collective agreement between SEIU and the Hospital – The Board found that there was no need for evidence of employee support to make the VRA valid: it was sufficient that, at the time the parties entered into the VRA, the SEIU was the legitimate bargaining agent for the employees, with language in its collective agreement that gave it a legal right to continue in that role with a new employer – Application to terminate bargaining rights dismissed – Related matters continue

STERIPRO CANADA LIMITED PARTNERSHIP; RE ONTARIO WORKERS' UNION; RE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1 CANADA; RE HUMBER RIVER REGIONAL HOSPITAL.....(Nov/Dec) 1107

Work Refusal – Health and Safety – Reprisal – Correctional Officers continued to stage a work refusal after being advised by the Inspector that they did not have the right to refuse work – The circumstances of the dispute involved an outside call to the jail that a "zap-gun" (a "zip-gun" is a "home-made" weapon) was in the jail – In the end the management at the jail decided to implement a Level 2 search, while the correctional officers believed a Level 4 search was necessary – The union argued there was no work refusal, that neither the employer nor the inspector followed the requirements outlined in s. 43 and as a result the order could not stand – The Board first stated it was satisfied that a work refusal was engaged in when the manager was advised by one of the CO's that "we are shutting her down," and they stopped doing their rounds – The Board then noted that the main issue was whether the Inspector was correct in his decision that s. 43 did not apply in these circumstances – The Board reviewed the prior case law on the exemptions noting that the exemptions are important for the maintenance of the public's health and safety and for the health and safety of inmates housed in correctional facilities – The Board noted that none of the cases discuss the reasons for the exemptions in any detail, but that those exempted workers (firefighters, police officers, correctional officers) are charged with the protection of others and their jobs are inherently dangerous – If they refuse work, they are putting lives at risk – After reviewing the circumstances of home made jail weapons, the Board found that carrying out searches in inmate living areas and cells with the possibility that there might be a homemade weapon, including a homemade "gun," is a normal part of the correctional officer's job, as long as the searches have the appropriate equipment – The circumstances that existed at the jail at that time were inherent to the correctional officers' work – Accordingly, the appeal of the inspector's order was dismissed – Remaining matters referred to the parties

HAMILTON-WENTWORTH DETENTION CENTRE; CHRIS DOWLING; STEVE SMITH,; DOUG KARIAM, INSPECTOR..... 1071

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